

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

2014 MSPB 19

Docket No. CH-0841-13-0334-I-1

**Andrew C. Eller, Jr.,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

March 21, 2014

Paula N. Dinerstein, Esquire, Washington, D.C., for the appellant.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has filed a petition for review challenging the initial decision, which did not sustain its reconsideration decision finding the appellant ineligible to receive a discontinued service retirement (DSR) annuity. For the reasons that follow, the administrative judge's initial decision is **AFFIRMED**, and OPM's reconsideration decision is **NOT SUSTAINED**.

BACKGROUND

¶2 The appellant was removed from his former position with the Department of the Interior in November of 2004 for unacceptable performance. *See Eller v. Department of the Interior*, MSPB Docket No. AT-0432-05-0195-I-1, Initial Decision (June 28, 2005). The appellant filed an initial appeal of his removal with the Board, and the Department of the Interior and the appellant entered into a settlement agreement which provided that the appellant would be “convert[ed] . . . to a four (4) year term appointment . . . as a Biologist (or other agreed upon position) beginning on January 12, 2005.” Initial Appeal File (IAF), Tab 6 at 24-25. The parties’ settlement agreement specified that “[t]he term of the appointment provided for the agreed upon position will be for the period January 12, 2005 through and including January 12, 2009. The intent of this provision is to provide the Appellant adequate time under current [OPM] regulations . . . to achieve a sufficient age and sufficient years of federal service to permit him to receive a discontinued service annuity should his federal service discontinue at the end of the term specified herein.” *Id.* at 27-28. At the time of the appellant’s removal from employment in November of 2004, the appellant was approximately 46 years old and had 18 years of federal service, thus making him ineligible for a DSR annuity under [5 U.S.C. § 8414\(b\)](#).¹ *See* IAF, Tab 6 at 44; Initial Decision (ID) at 2.

¶3 Following the execution of the settlement agreement, the appellant served as a Biologist in the term position for 4 years, at the expiration of which, the agency extended the appellant’s employment for 1 additional year. *See* IAF, Tab

¹ Under this section, an employee covered by the Federal Employees’ Retirement System (FERS) “who . . . is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency . . . after becoming 50 years of age and completing 20 years of service, is entitled to an annuity.” [5 U.S.C. § 8414\(b\)\(1\)\(A\)](#).

6 at 44. In February of 2010, the Department of the Interior separated the appellant from service citing the expiration of his term appointment, *id.*, and the appellant applied for an immediate DSR annuity with OPM, *see id.* at 42. At the time of his application for a DSR annuity in February of 2010, the appellant had over 23 years of federal service and was 51 years old. *Id.* at 47.

¶4 OPM issued an initial decision in September of 2012 denying the appellant's application for a DSR annuity, *id.* at 16, and it issued a final reconsideration decision in February of 2013 again finding that the appellant was ineligible for such an annuity, *id.* at 6. In its decisions, OPM determined that the appellant was ineligible to receive a DSR annuity at the time of his separation from employment in November of 2004 because he failed to satisfy both the age and service requirements at that time, *id.*, and it further explained that it would not credit the 5 years he served in the term Biologist position toward his DSR annuity eligibility because the settlement agreement assigning him to that term position "granted [him] . . . a retirement right where none existed." *Id.* In making this determination, OPM explained that "[i]t appeared that [the Department of the Interior] gave [the appellant] a term appointment with the expectation that [OPM] would grant [the appellant] . . . a [DSR annuity]," *id.*, and that its policies prohibit "agencies though [sic] settlement agreements to grant DSR's [sic] to employees who have a career in a long term appointment, and then move to a short term appointment with the expectation of receiving a discontinued service retirement," *id.*

¶5 The appellant filed an initial appeal of OPM's reconsideration decision. IAF, Tab 1. The administrative judge issued an initial decision reversing OPM's reconsideration decision. *See ID* at 7. In his initial decision, the administrative judge rejected OPM's argument that the settlement agreement "was an artifice designed to evade the statutory [DSR] requirements" which gave the appellant a right to receive retirement benefits where one did not otherwise exist; he also rejected OPM's argument that the appellant's acceptance of the term position

pursuant to the terms of the settlement agreement made his subsequent separation voluntary. *See Id.* at 3-4. OPM has filed a petition for review challenging the administrative judge’s findings, *see* Petition for Review (PFR) File, Tab 1, and the appellant has filed a response in opposition to the petition for review, *see* PFR File, Tab 3.

ANALYSIS

The settlement agreement which provided the appellant a term position was not an artifice designed to evade the statutory requirements of a DSR annuity.

¶6 A federal employee covered by FERS who “is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency . . . after completing 25 years of service, or after becoming 50 years of age and completing 20 years of service, is entitled to an annuity.” [5 U.S.C. § 8414\(b\)](#); *see also* [5 C.F.R. § 842.206\(a\), \(b\)](#).² OPM’s regulations do not define when a separation from service is “involuntary” for the purposes of a DSR annuity. *See* [5 C.F.R. § 842.206](#). OPM, however, has provided guidance in its Civil Service Retirement System and Federal Employees’ Retirement System Handbook for Personnel and Payroll Offices (Handbook) as to when a separation is involuntary for purposes of a DSR annuity. *See* Handbook § 44A1.1-2A. Examples of when a separation is involuntary include, inter alia, a reduction-in-force, an abolishment of the position, the expiration of the incumbent’s term in office, and a removal based upon unacceptable performance. *Id.*; *see also* *Gaghan v. Office of Personnel Management*, [111 M.S.P.R. 397](#), ¶¶ 11-12 n.4 (2009), *aff’d*, 370 F. App’x 119 (Fed. Cir. 2010).

¶7 As a general matter, “the retirement statutes allow for no discretion on the part of OPM in determining an individual’s entitlement to an annuity.” *Jordan v.*

² A similar entitlement to a DSR annuity exists for employees under the Civil Service Retirement System (CSRS). *See* [5 U.S.C. § 8336\(d\)](#).

Office of Personnel Management, [108 M.S.P.R. 119](#), ¶ 9 (2008). “OPM is [therefore] constrained by law to follow the annuity computation formulas passed by Congress” and it “has no discretion to deviate from these computation formulas.” *Thompson v. Office of Personnel Management*, [81 M.S.P.R. 677](#), ¶ 6 (1999), *aff’d in part, vacated in part, and remanded*, 230 F.3d 1381 (Fed. Cir. 2000) (Table). In *Parker v. Office of Personnel Management*, [93 M.S.P.R. 529](#), ¶ 18 (2003), *aff’d*, 91 F. App’x 660 (Fed. Cir. 2004), however, the Board recognized that “OPM has the authority to determine whether any separation date established by [a] [settlement] agreement is an artifice designed to evade the statutory requirements for entitlement to an annuity” when OPM is not a signatory or party to such an agreement. *See also Stevenson v. Office of Personnel Management*, [103 M.S.P.R. 481](#), ¶ 12 (2006) (“[T]he Board held [in *Parker*] that OPM has the authority to disregard a personnel action taken pursuant to a settlement agreement to which OPM was not a party, when the personnel action was an evasive device designed to allow the appellant to qualify for retirement benefits for which he would otherwise have been ineligible.”). Applying this rule in *Parker*, the Board found that OPM was not bound by the import of the settlement agreement because it created “documents suggesting that the appellant was appointed to a civilian position” at an earlier point in time than he actually was, which “were designed for no other purpose than *to give the appearance* that the appellant had the service necessary for him to receive a CSRS annuity.” *Parker*, [93 M.S.P.R. 529](#), ¶ 20 (emphasis added). Under these circumstances, the Board held that OPM properly denied the employee an annuity because the settlement agreement, through legal fiction alone, created a purported right to retirement benefits on paper where one did not otherwise exist. *See id.*, ¶¶ 18, 20-21.

¶8 Relying on *Parker*, OPM argues the settlement agreement returning the appellant to work in a term position amounted to such an artifice to evade the statutory eligibility requirements for a DSR annuity. *See PFR File, Tab 1 at 9*

(“[T]he administrative judge erred in ignoring the expressly stated purpose of the settlement agreement – to create legal fiction of DSR entitlement.”). We cannot agree with OPM’s reliance on *Parker* under the facts of this case. Unlike the settlement agreement in *Parker*, which only created the impression of an employee’s right to receive a retirement annuity on paper, *see Parker*, [93 M.S.P.R. 529](#), ¶ 20, here, the settlement agreement returned the appellant to actual employment with his employing agency and the appellant actually served in this position for 5 years. *See* ID at 4; IAF, Tab 9 at 5. This case is therefore distinguishable from *Parker* because this employment arrangement was not an “evasive device designed to allow the appellant to qualify for retirement benefits for which he would otherwise have been ineligible,” *Stevenson*, [103 M.S.P.R. 481](#), ¶ 12, but rather was a means for returning the appellant to actual employment in order for him to qualify for a DSR annuity under the annuity computation formula. The fact that the settlement agreement’s purpose was to return the appellant to service until he qualified for a DSR annuity does not create an artifice to evade statutory requirements.

¶9 When an employee is assigned to a position of employment in the federal service and actually serves in that position,³ OPM “has no discretion to deviate from the computation formulas,” and it cannot deny the employee an annuity based on its subjective determination that the employee’s federal service fails to qualify him for an annuity when he otherwise objectively satisfies the statutory annuity formula. *See Parker*, [93 M.S.P.R. 529](#), ¶ 20; *Thompson*, [81 M.S.P.R.](#)

³ OPM argues on petition for review that the Department of the Interior did not have a legitimate management need for the appellant to fill the Biologist position because he was allowed to select from among 4 open Biologist positions with the Department of the Interior, nationwide. *See* PFR File, Tab 1 at 7. We find this argument unpersuasive. Allowing an employee to select his assignment from several available positions does not mean that there was no legitimate need for any of those positions. OPM, moreover, has presented no evidence that the appellant did not perform the essential duties of his term position during the 5 years he served in the position.

[677](#), ¶ 6.⁴ Under these circumstances, OPM is required to apply the retirement annuity computation formulas objectively, and it may not reject an application for a DSR annuity either because it believes that the employee’s federal service should not be counted toward his DSR annuity eligibility or because it disagrees with the motivation for returning the employee to actual federal service.⁵ See *Thompson*, [81 M.S.P.R. 677](#), ¶ 6; see also *Parker*, [93 M.S.P.R. 529](#), ¶ 20 (noting that OPM had the authority to disregard a settlement creating documents which “were designed for no other purpose than to give the appearance that the appellant had the service necessary to receive a CSRS annuity”) (emphasis added).

¶10 We therefore agree with the administrative judge that the settlement agreement assigning the appellant to a term position was not an artifice designed

⁴ In further support of this limitation, we note that OPM itself has argued to the Federal Circuit that an alleged involuntary retirement under chapter 75 cannot qualify as an involuntary separation for the purposes of a DSR annuity because, if required to process such a claim, OPM would “ha[ve] no authority and no regulations by which it could hale the [appellant’s former employing] agency into court to test the employee’s assertions” that her separation from employment was coerced. See *Nebblett v. Office of Personnel Management*, [237 F.3d 1353](#), 1358 (Fed. Cir. 2001) (agreeing with OPM’s argument that “the remedies for coerced resignations [under chapter 75] and for retirement annuities when an employee is involuntarily removed are entirely different” and that “OPM is not equipped to resolve the question of whether [the appellant’s] resignation was coerced by unlawful agency action” under chapter 75). Because OPM has no mechanism in place to explore the nature of the appellant’s federal service, we find that OPM erred in concluding that the appellant’s 5-year service in a term position should not be counted toward his DSR annuity eligibility. See *id.*; see also *Thompson*, [81 M.S.P.R. 677](#), ¶ 6.

⁵ We thus also reject OPM’s assertion that although the appellant “perform[ed] creditable service during his term appointment,” he did not “‘earn[]’ a DSR retirement [because] the parties to the settlement agreement arranged for it.” PFR File, Tab 1 at 9. Contrary to OPM’s reasoning, we do not believe that the parties’ intent to return the appellant to federal service in order for him to accrue sufficient federal service to apply for a DSR annuity vitiates the employee’s objective satisfaction of the federal service longevity requirement for a DSR annuity.

to evade the statutory DSR annuity requirements. Because the parties' settlement agreement required the appellant to provide actual employment services for the Department of the Interior, which the appellant performed, OPM lacks the discretion to reject the appellant's application for a DSR annuity where, as here, the appellant otherwise qualifies for an annuity under the statutory computation formula. We concur with the administrative judge that OPM erred in finding the appellant ineligible for a DSR annuity based upon his assignment to a term position pursuant to the settlement agreement.

The appellant was involuntarily separated from service, thus making him eligible for a DSR annuity at the end of his term position.

¶11 OPM also argues that the appellant was not involuntarily separated from employment in February of 2010 because he voluntarily accepted a term position which he knew was limited in duration pursuant to the terms of the parties' settlement agreement. *See* PFR File, Tab 1 at 8-9. We disagree with OPM's assertion that the appellant's separation from employment under these circumstances was voluntary. "A separation is involuntary if the separation is against the will and without the consent of the employee." *Matthews v. Office of Personnel Management*, [4 M.S.P.R. 431](#), 435 (1980); *see also Gaghan*, [111 M.S.P.R. 397](#), ¶ 12 n.4. The Board has previously found separations from service to be voluntary when, inter alia, an employee resigns from employment pursuant to the terms of a settlement agreement or applies for either retirement or disability retirement. *See Jordan*, [108 M.S.P.R. 119](#), ¶¶ 11-12 (finding that an appellant who resigned pursuant to a settlement could not claim his separation was involuntary for purposes of receiving a DSR annuity); *Gaghan*, [111 M.S.P.R. 397](#), ¶ 12 (finding that an application for disability retirement which is rejected does not transform an employee's separation from employment into an involuntary separation). As our decisions make clear, the hallmark of a voluntary separation from employment is the employee's initiation of his separation from employment. *See, e.g., Miller v. Department of Homeland Security*, [111 M.S.P.R.](#)

[325](#), ¶ 10 (2009) (“[T]he appellant was not lawfully involuntarily separated from his position when he decided to retire . . . instead of accepting the offered assignment.”), *aff’d*, 361 F. App’x 134 (Fed. Cir. 2010).

¶12 Differing from these cases, however, the appellant in the instant appeal did not initiate his separation from employment with the Department of the Interior in February of 2010; rather, the appellant was separated based upon the expiration of his term appointment at the agency’s initiative. *See* IAF, Tab 6 at 44. The expiration of a term appointment, moreover, is included within OPM’s enumeration of involuntary separations in its Handbook, *see* Handbook, § 44A1.1-2A, and consistent with this written guidance, we find that the appellant’s separation from employment upon the end of his term position was involuntary. *See Warren v. Department of Transportation*, [116 M.S.P.R. 554](#), ¶ 7 n.2 (2011) (“Although the Handbook lacks the force of law, it is entitled to deference in proportion to its ‘power to persuade.’”), *aff’d*, 493 F. App’x 105 (Fed. Cir. 2013). We further note that the Department of the Interior extended the appellant’s term position for 1 additional year, thus further demonstrating that the decision to separate the appellant from employment rested with the agency, not the appellant, and that the appellant’s separation in February of 2010 was not a voluntary act which the appellant initiated.⁶ *See Nebblett*, 237 F.3d at 1356 (involuntary separations generally “are proper and legal acts taken by an agency that result in an employee’s involuntary separation”); *see also id.* at 1359 (citing Board decisions which hold that an “‘involuntary separation’ . . . require[s] lawful agency action that provoked a separation”).

⁶ The settlement agreement, moreover, did not provide that the appellant would be separated from employment upon a date certain, just that “[t]he term of appointment . . . will be for the period January 12, 2005 through and including January 12, 2009.” IAF, Tab 6 at 27.

¶13 In further support of its argument on petition for review, OPM cites to a section of its Handbook providing that “[a] separation is not qualifying for discontinued service retirement if the employee *voluntarily leaves* regular long-term (career) employment to accept a short-term employment with full knowledge of its earlier termination.” See PFR File, Tab 1 at 9 (citing Handbook, § 44A2.1-8A) (emphasis added). We do not find OPM’s citation to this portion of its Handbook persuasive. See *Warren*, [116 M.S.P.R. 554](#), ¶ 7 n.2. The record reflects that the appellant did not “voluntarily leave[] regular long-term (career) employment” in November of 2004 in order to accept a short-term position, but rather was involuntarily removed from employment for unacceptable performance under chapter 43.⁷ OPM’s reliance on this provision of its Handbook to deny the appellant a DSR annuity based upon his 5-year service in a term position is therefore misplaced. OPM’s Handbook further explains, however, that “[i]n certain situations, terminations from short-term employment may be considered involuntary for discontinued service retirement. This would be the case if the appointment immediately followed an involuntary separation.” Handbook, § 44A2.1-8B. Such are the facts of the present case. Thus, consistent with this portion of OPM’s Handbook, we find that the expiration of the appellant’s term position, which immediately followed his involuntary separation from employment under chapter 43, constitutes an involuntary separation from federal service which allows the appellant to apply for a DSR annuity. See *id.*

ORDER

¶14 For the above-stated reasons, the administrative judge’s initial decision reversing OPM’s reconsideration decision is AFFIRMED, and OPM’s final determination denying the appellant a DSR annuity is NOT SUSTAINED.

⁷ OPM does not dispute that the appellant’s removal under chapter 43 was involuntary. See PFR File, Tab 1.

- ¶15 We ORDER the Office of Personnel Management (OPM) to award the appellant a discontinued service retirement annuity. OPM must complete this action no later than 20 days after the date of this decision.
- ¶16 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. See [5 C.F.R. § 1201.181\(b\)](#).
- ¶17 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. See [5 C.F.R. § 1201.182\(a\)](#).
- ¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You

must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov.

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:

William D. Spencer
Clerk of the Board
Washington, D.C.