UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 100

Docket No. PH-0831-08-0559-I-1

Thomas E. Gaghan, Jr.,
Appellant,
v.
Office of Personnel Management,
Agency.

OPM Claim No. CSA:4405722

June 5, 2009

Joseph J. Chester, Esquire, Pittsburgh, Pennsylvania, for the appellant.

Roxann Johnson, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of an initial decision reversing its reconsideration decision in this case and finding the appellant entitled to discontinued service retirement benefits. For the reasons stated below, we GRANT the petition, REVERSE the initial decision, and AFFIRM OPM's reconsideration decision. The appellant is not entitled to the retirement benefits he seeks here.

BACKGROUND

¶2 On August 1, 2001, the appellant filed an application for disability retirement. *See* Appeal File, MSPB Docket No. PH-0831-05-0239-I-1 (239 File), Tab 5, Subtab 2F at 14. On February 13, 2002, OPM approved the application, and 1 week later the appellant's employing agency, the U.S. Postal Service, processed the appellant's separation for disability retirement. *Id.*, Subtab IIC; Appeal File, MSPB Docket No. PH-0831-08-0559-I-1 (559 File), Tab 3, Subtab 6 at 1, 5. After receiving correspondence in which the Postal Service questioned the appellant's entitlement to a disability retirement annuity, however, OPM reevaluated the case, and on January 18, 2005, it rescinded its approval, finding that the appellant did not meet the criteria for disability retirement. 239 File, Tab 5, Subtab A at 1-4; *id.*, Subtab B. Although the appellant challenged the rescission of his annuity, the action was upheld by the Board and by the U.S. Court of Appeals for the Federal Circuit. *Gaghan v. Office of Personnel Management*, MSPB Docket No. PH-0831-05-0239-I-2 (Initial Decision, Oct. 18, 2005), *aff'd*, 250 F. App'x 319 (Fed. Cir. 2007).

¶3 After the Federal Circuit had issued its decision on the appellant's disability retirement appeal, the appellant submitted an application for a discontinued service retirement annuity. 559 File, Tab 3, Subtab 5 at 1-6; *id.*, Subtab 6 at 14. OPM denied that application; it sustained its denial in a reconsideration decision; and the appellant appealed the reconsideration decision to the Board's Northeastern Regional Office. *Id.*, Subtabs 2, 4; 559 File, Tab 1. The administrative judge to whom the appeal was assigned issued an initial decision reversing OPM's reconsideration decision and finding the appellant entitled to a discontinued service annuity. Initial Decision, 559 File, Tab 15. In that decision, she found that OPM had misled the appellant by approving his disability retirement application, that the appellant had relied on this misinformation to his detriment in retiring, and that the appellant's disability retirement therefore was involuntary. *Id.* at 4-7.

¶4 OPM has filed a timely petition for review of the initial decision, and the appellant has filed a timely response. Petition for Review (PFR), PFR File, Tabs 1, 3.

ANALYSIS

¶5 A CSRS employee who has completed at least 25 years of service, and who "is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency," is entitled to a discontinued service annuity under 5 U.S.C. § 8336(d)(1). The appellant had over 30 years of service on the effective date of his disability retirement. *See* 559 File, Tab 3, Subtab 6 at 5.[1] He therefore would be entitled to a discontinued service retirement annuity if he was "separated . . . involuntarily," as that phrase is used in 5 U.S.C. § 8336(d).

¶6 As we have indicated above, the administrative judge found that the appellant had met this criterion. In doing so, she relied on holdings, by the Board and by our reviewing court, that a resignation or retirement that was based on incorrect or misleading information was involuntary, i.e., that it was tantamount to a removal. *See* Initial Decision at 3-4 (citing *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984), *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983), *Aldridge v. Department of Agriculture*, 110 M.S.P.R. 21 (2008), *Cortinas v. Office of Personnel Management*, 32 M.S.P.R. 513, 515 (1987), and *Rysavy v. Department of Housing & Urban Development*, 28 M.S.P.R. 263, 265 (1985)).

¶7 OPM argues on petition for review that the administrative judge applied an incorrect standard in finding that the appellant's separation was involuntary. PFR at 6.[2] We agree with OPM.

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[1] The appellant was not eligible to retire under 5 U.S.C. § 8336(a) at that time because he was not yet 55 years old. *See* 559 File, Tab 3, Subtab 6 at 5; 5 U.S.C. § 8336(a) (an employee who is separated from federal service after becoming 55 years of age and completing 30 years of service is entitled to an immediate annuity).

[2] The appellant appears to argue in his response to the petition that OPM failed to "file any prehearing submission," that it failed to respond to the appellant's argument below,

¶8 We note first, in this regard, that the cases on which the administrative judge relied in referring to the rule that a resignation or retirement based on misinformation is involuntary generally deal with actions allegedly effected under 5 U.S.C. chapter 75. That is, they generally deal with alleged de facto removals under 5 U.S.C. § 7512(1), in which the individual seeks restoration as an employee. *See Covington*, 750 F.2d at 941, 944 (an employee who retired after receiving a reduction-in-force (RIF) notice informing him that he had no right of assignment or retention was to be given, on remand, an opportunity to present evidence that he was misinformed, and that he would, in the absence of his retirement, have been entitled to be retained as an employee); *Scharf*, 710 F.2d at 1575 (because the petitioner's decision to retire was based on misleading advice, it was involuntary and therefore an adverse action; and because it was effected without benefit of the procedures agencies are required to follow in effecting adverse actions, the individual's employing agency was ordered to cancel the retirement and reinstate him retroactively in his former position); *Aldridge*, 110 M.S.P.R. 21, ¶¶ 2, 13 (the Board remanded the appeal for a hearing on the issue of whether the appellant's retirement was the result of agency misinformation and therefore an involuntary act within the Board's jurisdiction as a constructive discharge); *Rysavy*, 28 M.S.P.R. at 265 (the Board remanded the appeal for a hearing on whether the appellant's retirement prior to the effective date of his scheduled RIF action was involuntary, and therefore tantamount to a removal,

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and that it "cannot now complain that the MSPB judge misunderstood the issue or the applicable law." PFR File, Tab 3 at 2-3. OPM's arguments are stated in considerably less detail below than on petition for review. *See* 559 File, Tab 3 (agency file) at 1; *id.*, Tab 3, Subtab 2 (reconsideration decision). That agency did raise below, however, the arguments addressed here. That is, it argued before the administrative judge and explained in its reconsideration decision that the appellant was not "separated involuntarily," and that *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), which we address further below, bars the appellant's claim. 559 File, Tab 3 at 1; *id.*, Tab 3, Subtab 2 at 1.

because it was based on misinformation regarding the effect of the retirement on his right to appeal the RIF action).[3]

¶9 "[T]he Board has long held that the determination of an involuntary separation for retirement purposes under 5 U.S.C. [chapter] 83 is totally separate and distinct from a determination of involuntary retirement or resignation for Board jurisdictional purposes under 5 U.S.C. [chapter] 75." *Allen v. Office of Personnel Management*, 77 M.S.P.R. 212, 216 (1998). In the present case, the appellant does not allege that his former employer obtained his resignation in violation of 5 U.S.C. chapter 75 by providing him, either intentionally or negligently, with misinformation, and he does not seek to have his separation from the Postal Service cancelled. Instead, as we have indicated above, he seeks to have his disability retirement annuity replaced with a discontinued service annuity. The cases on which the administrative judge relied therefore are inapplicable here. *See Sanderson v. Office of Personnel Management*, 72 M.S.P.R. 311, 316 (1996) (even if the appellant's former employing agency had obtained his resignation by providing him with misinformation regarding his entitlement to an annuity, a finding of involuntariness based on such misinformation would be insufficient to establish entitlement to a discontinued service retirement annuity under 5 U.S.C. § 8336(d)), *aff'd*, 129 F.3d 134 (Fed. Cir. 1997) (Table), *cert. denied*, 522 U.S. 1115 (1998); *Gammill v. Office of Personnel Management*, 29 M.S.P.R. 484, 488-89 (1985) (the employing agency's incorrect statement that the appellant would be eligible for a discontinued service annuity if he retired, although providing a basis for voiding the resignation and restoring the appellant to the employment rolls, did not make the appellant eligible for an annuity).

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[3] The other case on which the administrative judge relied, i.e., *Cortinas*, concerns misleading information on which the individual relied in electing, at the time of his separation, to receive a monthly annuity rather than a lump-sum distribution of his retirement contributions. *See Cortinas*, 32 M.S.P.R. at 515. This case has no relevance to the requirements of 5 U.S.C. § 8336(d)(1).

¶10 We note further that our reviewing court has considered a case similar to the one now before us. In *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1354-55 (Fed. Cir. 2001), it addressed a claim that the petitioner's employing agency had coerced the petitioner's resignation through improper actions (in that case, intolerable working conditions), that the petitioner accordingly was involuntarily separated, and that she therefore was entitled to a discontinued service retirement annuity under 5 U.S.C. § 8336(d)(1). The court noted that a separation obtained through intolerable working conditions or through misinformation was unlawful, *id.* at 1358, and it held that the "type of involuntary separation to which section 8336(d)(1) speaks is one that results from lawful agency action," *id.* at 1359. It concluded, therefore, that, even if the petitioner could prove that her resignation was involuntary as alleged, she would not be eligible to receive a discontinued service annuity. *Id.*

¶11 The court's decision in the case described above, as well as the underlying Board decision in the same case, was based in part on a provision of the Federal Personnel Manual (FPM) defining the term "involuntary," as that term was used in 5 U.S.C. § 8336(d)(1). The court noted that the FPM defined that term as applying to separations under conditions such as "reductions in force, expiration of an incumbent's term of office, and other actions, all of which are proper and legal acts taken by an agency that result in an employee's involuntary separation." *Id.* at 1356; *see Nebblett v. Office of Personnel Management*, 83 M.S.P.R. 524, ¶ 8 (1999) (referring to same definition). Although the FPM has been abolished, OPM has continued to define the term in a similar manner in its *CSRS and FERS Handbook (Handbook)*, whose provisions have superseded the relevant part of the FPM. *See Handbook*, § 44A1.1-2A; *Nebblett*, 237 F.3d at 1358. According to the Handbook, "[a]n involuntary separation that may qualify an employee for a discontinued service retirement is any separation against the will and without the consent of the employee other than a separation for cause on charges of misconduct or delinquency." *Handbook*, § 44A1.1-2A.

¶12 Nothing in the Handbook definition quoted above suggests that the separation of the appellant in this case for disability retirement qualifies as an "involuntary separation" for purposes of discontinued service retirement. The appellant does not argue that his separation was against his will or without his consent, and he does not deny that he voluntarily applied for retirement. Moreover, none of the examples the Handbook includes with its definition describe circumstances that could be said to be present here.[4]

¶13 The case now before us differs somewhat from *Nebblett* in that the appellant in this case allegedly relied on misinformation that was provided by OPM, rather than by his employing agency. The decision of the U.S. Supreme Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), however, indicates that these differences are immaterial to the outcome of this case. In *Richmond*, 496 U.S. at 416, 434, the Court held that an individual's reliance on misinformation provided by a government official could not serve as a basis for the individual's entitlement to annuity benefits not otherwise permitted by law. Moreover, while the misinformation at issue in that case was provided by an official of the individual's employing agency, *see id.* at 416-17, nothing in *Richmond* suggests that the result in the case would have been different if the misinformation had been provided by OPM. Instead, the reasoning on which the decision is based indicates that misinformation provided by any Executive Branch official would provide an insufficient basis for awarding benefits because that branch is not empowered by the Constitution to overrule "the difficult judgments reached by Congress as to the common good . . . ." *Id.* at 427-28; *see id.* at 428 ("If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the

[4] Examples of "involuntary separations" listed in the Handbook include, in addition to the ones mentioned by the court in *Nebblett*, "[u]nacceptable performance (unless due to employee's misconduct)," "[r]eassignment outside commuting area when no mobility agreement exists," and "[f]ailure to continue to meet qualification requirements of the position . . . ." *Handbook*, § 44A1-1-2A.

control over public funds that the [Appropriations] Clause reposes in Congress in effect could be transferred to the Executive.”).

¶14 For the reasons stated above, we need not determine whether OPM’s 2002 approval of the appellant’s disability retirement application can properly be regarded as the providing of misinformation or misleading information on which the appellant relied to his detriment. Even if it can properly be regarded in this manner, it does not provide a proper basis on which to find that the appellant is entitled to a discontinued service retirement annuity under 5 U.S.C. § 8336(d)(1).

ORDER

¶15 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 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, 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:

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