



## U.S. MERIT SYSTEMS PROTECTION BOARD

**Case Report for September 12, 2014**

### **BOARD DECISIONS**

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

**Agency: Office of Personnel Management**

**Decision Number: [2014 MSPB 72](#)**

**MSPB Docket Number: CH-0841-13-0334-R-1**

**Issuance Date: September 5, 2014**

**Appeal Type: Petition for Reconsideration**

**Action Type: Discontinued Service Retirement**

**Standard of Review for OPM Petitions for Reconsideration**

**Consideration of Extended Term Appointments for DSR Annuity**

**Scope of Review for Application for DSR Annuity**

**Eligibility for DSR Annuity After Term Appointment**

The agency agreed to settle the appellant's appeal of his performance based removal by reinstating the appellant in a term position for a period of 4 years. At the end of the 4-year term, the agency extended his appointment for 1 more year. The purpose of the term appointment was to allow him to meet the age and service requirements of a discontinued service retirement (DSR) annuity. After the expiration of his term, the appellant applied for a DSR, but OPM denied his application based on its conclusion that the settlement agreement was designed to evade statutory requirements for receiving a DSR annuity. The appellant appealed OPM's decision, and the administrative judge reversed. The Board upheld the administrative judge's decision, holding that because the appellant objectively met the statutory requirements for a DSR annuity, OPM did not have the authority to deny his application. OPM filed a petition for reconsideration, arguing that it has an obligation to determine whether separation from service is involuntary, and that the appellant's 5-year term should not count toward his service requirement because term positions

may not last more than 4 years.

Holding: The Board affirmed as modified its prior Opinion and Order.

1. The Board will consider de novo arguments made by OPM on a petition for reconsideration, even if OPM was previously a party in the proceeding.
2. The appellant's *ultra vires* extension of his term appointment beyond the 4-year limit did not negate the entire period of his term appointment for purposes of eligibility for a DSR annuity.
3. Neither the Board nor OPM should engage in a merits-based review of why an agency appointed an employee to a term position after the employee serves in the position and objectively qualifies for a DSR annuity.
4. The Board declined to apply its holding in *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529 (2003), *aff'd*, 91 F.App'x 660 (Fed. Cir. 2004), to this case, because in this case the appellant actually served in the position designated by the settlement agreement.
5. The Board declined to apply OPM's "general rule" that an applicant does not qualify for a DSR annuity if he voluntarily leaves long-term employment to accept a short-term appointment. Here, the appellant did not actually voluntarily take this action; his action was initiated by the removal.
6. The Board modified its prior factual holding that the appellant served 5 full years in his term position after his removal, but stated that the modification did not change the end result because the amount of time he did serve still qualified him for a DSR annuity.

**Appellant:** David R. Ellis

**Agency:** United States Postal Service

**Decision Number:** [2014 MSPB 73](#)

**MSPB Docket Number:** SF-0752-13-0283-I-1

**Issuance Date:** September 9, 2014

**Appeal Type:** Adverse Action

**Action Type:** Demotion

### **Disparate Penalty Analysis**

The appellant was demoted based on a charge of unacceptable conduct relating to an allegation that he misrepresented mail volume reports. The

administrative judge found that the appellant intentionally misrepresented mail volumes and that the penalty of a demotion was reasonable.

**Holding:** The Board affirmed the AJ's finding as to proof of the charge but mitigated the penalty to a letter of warning and a geographic reassignment.

1. If an appellant shows that there is enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, then the agency must present a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. Here, the penalty was mitigated because the appellant established that he was punished more harshly than a similarly situated employee.

## **The U.S. Court of Appeals for the Federal Circuit issued nonprecedential decisions in the following cases:**

**Petitioner:** Darlene M. Broughton

**Respondent:** Merit Systems Protection Board

**Tribunal:** U.S. Court of Appeals for the Federal Circuit

**Case Number:** [2014-3063](#)

**MSPB Docket No.** SF-0752-13-0101-I-1

**Issuance Date:** September 11, 2014

**Jurisdiction - Involuntary Resignation**

**Jurisdiction - Involuntary Disability Retirement**

**Applicability of Unemployment Board Decision**

**Standard for Coercion/Involuntary Resignation**

The appellant filed an untimely appeal by three years, alleging that her resignation and subsequent retirement from the position of Program Support Assistant was involuntary and due to duress. The appellant asserted that she was left with no choice but to resign because she developed asthma as a result of "noxious chemicals or bio hazardous waste" close to her desk, and that she was otherwise coerced into resignation because coworkers deliberately placed poisonous substances near her workplace in an effort to cause asthmatic reactions. The administrative judge dismissed the appeal for lack of jurisdiction based on a finding that her resignation was voluntary and did not

address the underlying timeliness issue.

**Holding:** The Court affirmed.

- 1. An employee initiated resignation is presumed voluntary unless the employee rebuts this presumption by establishing, by a preponderance of the evidence, that a self-initiated action was actually coerced by the agency or otherwise involuntary because the decision was based on the agency's misinformation or deception, or the result of coercion by the agency through the creation of working conditions so intolerable for the employee that she is driven to involuntarily resign or retire.**
- 2. An involuntary disability retirement is established by showing that there was an accommodation available on the date of the separation that would have allowed the employee to continue their employment, and that the agency did not provide that accommodation. Here, the appellant did not provide such evidence.**
- 3. A state unemployment decision finding involuntary resignation is not binding on the Board.**
- 4. Under the totality of the circumstances, the appellant failed to establish she was coerced into involuntarily resigning because she failed to provide any evidence that her coworkers were deliberately exposing her to dangerous substances or trying to kill her.**

**Petitioner: Ronald Neal Batdorf**

**Respondent: Merit Systems Protection Board**

**Tribunal: U.S. Court of Appeals for the Federal Circuit**

**Case Number: [2014-3080](#)**

**MSPB Docket No. DC-0752-11-0461-I-1**

**Issuance Date: September 11, 2014**

### **Untimely Filed Petition for Review Withdrawal of Appeal**

In May 2011, the appellant withdrew his appeal alleging that he was subjected to a reduction in pay and grade, and the AJ dismissed the appeal as withdrawn. Two years later, the appellant filed a petition for review of the dismissal. The Board dismissed the petition for review as untimely and found that the appellant had not established diligence or ordinary prudence to show good cause for the untimely filing or support for his request for a reopening.

**Holding: The Court affirmed.**

**1. To establish good cause for an untimely filing, the petitioner need not show that it was impossible to file timely, only that the delay was excusable under the circumstances where diligence or ordinary prudence had been exercised. Here, the court found that the appellant did not exercise due diligence from the period he asserts he obtained new and material evidence.**

**2. The appellant's assertion that he would never have withdrawn his original petition for appeal in 2011 had the AJ not advised him in pre-decisional discussions that he was likely to find that the Board did not have jurisdiction over his appeal did not fit into the category of unusual circumstances sufficient to reinstate the appellant's withdrawn appeal.**

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