



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for October 4, 2019

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Michael Montelongo

Respondent: Office of Personnel Management

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

Case Number: [2018-2095](#)

MSPB Docket Number: DE-0842-18-0087-I-1

Issuance Date: October 2, 2019

RETIREMENT

- DEFINITIONS
- SERVICE CREDIT

The petitioner attended the U.S. Military Academy from 1973 to 1977. He then served in the Army from 1977 to 1996, when he retired from the military. In 2001, he received a civilian appointment as a Presidential appointee in the Department of the Air Force. He served in that civilian appointment for a little less than 4 years. During his civilian service, a human resources official advised him that he could pay a deposit for the time he spent as a cadet at the academy in order for that time to be credited toward an eventual Federal Employees' Retirement System (FERS) retirement annuity. The appellant made the deposit.

However, when the petitioner applied for an annuity, OPM found that he was ineligible because only his time as a Presidential appointee constituted creditable civilian service and he therefore lacked the required 5 years of such service. He filed a Board appeal challenging his determination.

The administrative judge affirmed OPM's decision, finding that the appellant's service as a cadet was military service and therefore could not be used to satisfy the requirement that he have at least 5 years of creditable civilian service. The appellant did not file a petition for review with the Board, but he did timely file an appeal at the Federal Circuit.

Holding: The Court held that although cadet service is creditable service, it is military service that cannot be used to satisfy the requirement that an employee complete at least 5 years of creditable civilian service in order to be eligible for a FERS retirement annuity.

- 1) To be eligible for a FERS annuity under 5 U.S.C. § 8410, an employee "must complete at least 5 years of civilian service creditable under section 8411." Thus, the 5 years of service must qualify as both civilian service and creditable service.
- 2) West Point cadet time is specifically defined in 5 U.S.C. § 8401(31) as military service. Because the statute defines military service and civilian service as separate categories, cadet time cannot qualify as civilian service.
- 3) The petitioner argued that the court should treat his cadet time as distinct from "pure" military service. However, the court found no basis in the statute for such a distinction.
- 4) In support of his position, the petitioner cited both the advice he received regarding the deposit and guidance contained in an OPM handbook. However, the court held that neither government advice nor an OPM handbook could override the clear language of the statute that he needed at least 5 years of creditable civilian service in order to be eligible for a FERS annuity.