

The appellant sought to obtain Board review of the OPM decision pursuant to 5 U.S.C. § 8347(d), which states in part:

[A]n administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board....

Appellant also relied on 5 C.F.R. § 831.120(a), which permits an "individual or agency" whose rights or interests under the Civil Service Retirement System are affected by an OPM decision to appeal to the Board.

The Board's presiding official declined jurisdiction, however, on the theory that appellant did not have a "right or interest" in the determination of the status of its employees, within the meaning of § 8347(d)(1), and that the regulation was not an independent grant of jurisdiction but a mere reiteration of § 8347(d)(1). Implicit in the initial decision is a finding that the requisite right or interest lies only in the individual employee who has been turned down for some benefit based on a ruling by OPM as to that individual.

Since the Board has not earlier addressed the issue of whether the employing agency has a "right or interest" sufficient to bring an appeal pursuant to § 8347 under these circumstances, the parties were asked for additional briefs. For the reasons set out herein, the Board concludes that the initial decision was incorrect. The petition for review is therefore GRANTED.

In the absence of direct Board precedent on this issue, and because neither the statute nor regulations clearly define the Board's jurisdiction in the instant case, we have looked to Congressional intent to shed light on the subject. It appears that all legislation on this matter has been designed to enhance the youth and vigor of federal law enforcement personnel. However, Congress sought to achieve this purpose under earlier legislation by providing law enforcement officers with an early retirement option.^{2/} See Stewart v. Smith, 673 F.2d 485, 487, 493 (D.C. Cir. 1982). As this early version of the law shows, the definition of law enforcement officer was contained in the same provision which set forth the individual law enforcement employee's special entitlement to retirement benefits. In our view,

^{2/} See 5 U.S.C. § 8336(c) (1970) which provided, in pertinent part:

An employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position, who is separated from the service after becoming 50 years of age and completing 20 years of service in the performance of these duties is entitled to an annuity if the head of his agency recommends his retirement and the Civil Service Commission approves that recommendation. The head of the agency and the Commission shall consider fully the degree of hazard to which the employee is subjected in the performance of his duties, instead of the general duties of the class of the position held by the employee.

this suggests that Congress intended to link the definition directly to the retirement provision and thereby limit its applicability to cases involving individual retirement applications under that provision. In Obremski v. Office of Personnel Management and Merit Systems Protection Board, 699 F.2d 1263, 1271, n.31 (D.C. Cir. 1983), the court noted that the former Civil Service Commission (CSC) made its determinations of coverage under that provision on case-by-case application. While the agency's interest might have been indirectly affected by CSC's determinations in these individual applications for optional retirement, it is arguable that this was not the kind of interest contemplated by section 8347(d)(1).^{3/} This argument, however, loses much of its appeal when considered in light of the changes made by Public Law 93-350, 88 Stat. 355 (July 12, 1974).

A brief discussion of the conditions which led to the enactment of Public Law 93-350 is helpful in understanding the impact of the legislative changes on CSC's role in making determinations of coverage under former section 8336(c). As the court noted in Stewart v. Smith, supra, at 493, Congressional efforts to secure a young and vigorous law

^{3/} On the other hand, it could be argued that Congress recognized the agency's interest even in individual retirement applications since they were conditioned upon the agency's recommendation. Since the agency is in a better position to know the degree of hazard to which an employee is subjected, even under the earlier provision it can be argued that the agency had the kind of interest contemplated by section 8347(d)(1) which would be affected by CSC's disapproval of its recommendation.

enforcement work force through a scheme of voluntary early retirement with high annuities had not produced the desired result:

Highly capable workers were retiring after 20 years of service, while many less capable employees were staying on until their 70th birthday, in order to acquire 20 years of covered employment. Furthermore, early retirement was a one way street. Employees could choose to retire early, but the agency had no authority to require them to do so.

Id. (Footnote omitted).

While Congress did not abandon the early retirement scheme in enacting the current law,^{4/} it recognized that its goal could not be achieved without the active participation of the employing agencies. Thus, the 1974 legislation gave agencies the authority to set maximum ages upon initial entry into law enforcement positions ^{5/} and the authority to separate law enforcement personnel upon reaching age 55 with the requisite service.^{6/}

^{4/} See 5 U.S.C. § 8336(c) (1) (1980). The 1974 legislation reduced the section to a pure early optional retirement provision with no conditions attached. However, retirement annuities were restructured to provide less incentive for law enforcement officers to continue working after 20 years of service. See Stewart, supra, at 493.

^{5/} See 5 U.S.C. § 3307(d). While this section was not codified as part of the retirement law, it provided agencies with the authority to structure their hiring practices to implement the retirement scheme for law enforcement officers. See Stewart, supra, at 493.

^{6/} See 5 U.S.C. § 8335(b). In Conway v. Office of Personnel Management, MSPB Docket No. NY08318310260 (January 16, 1984), we held that the Board lacks jurisdiction over an employee's appeal from an OPM determination that his separation pursuant to section 8335(b) was proper. However, that case did not present the question of whether the Board has jurisdiction over a disputed OPM determination under section 8331(20) relating to the applicability of the mandatory retirement provision.

The authority given agencies by the above provisions effected a dramatic shift in CSC's role in making law enforcement coverage determinations. As the court noted in Stewart, supra, at 494, the position itself became the determinant of which set of retirement and annuity provisions applied, i.e., the special law enforcement provisions or the ones setting forth the general retirement provisions. No longer were CSC's law enforcement determinations geared by statute only to retirement applications. Rather, the 1974 amendments also created the situation where CSC's determinations directly impacted upon agencies' personnel policies, including the hiring and separation of law enforcement personnel. The new role given agencies in the implementation of the statutory scheme is also reflected in the amendment removing the definition of law enforcement officer from the early retirement provision contained in section 8336(c) and placing it in new section 8331(20).

We are persuaded by our review of the changes made by Public Law 93-350 that Congress intended to accord agencies a direct interest in CSC's determinations under section 8331(20).

Our view of the Congressional intent gains support from the court's opinion in Obremski, supra. There, the court had under consideration the question of OPM's interpretation of the law enforcement officer definition contained in section 8331(20). Considering the language of that section, the court reasoned that the "ordering of decisionmaking roles" effected by Congress under the provision required that OPM give deference to the employing agency's determination. The court

noted, moreover, that "[t]he employing agency ... has the greatest interest in and should have the greatest control over structuring the jobs within its own workforce." Id. at 1272 (footnote omitted).

The situation in Obremski demonstrates in a pragmatic way why Congress could not have intended to deny agencies a right of administrative appeal of OPM's decisions under section 8331(20). Although the administrative appeal was that of the employee, the court noted that OPM ignored the agency's interest in the matter. We cannot accept OPM's argument implying that Congress intended that an agency pursue its interests through the appeal of an employee or a survivor. OPM's approach would require piecemeal litigation which could result in conflicting outcomes involving cases of similar or identical factual circumstances. Such an approach does not foster the economy and efficiency of litigation. See Williams v. Department of the Army, 715 F.2d 1485, 1488-90 (Fed. Cir. 1983). We therefore hold that Congress intended that an agency be permitted to pursue its own interests under section 8331(20) by filing an appeal under section 8347(d)(1).

Accordingly, the initial decision dismissing the appeal for lack of jurisdiction is hereby REVERSED and the case is REMANDED for further proceedings and adjudication on the merits.

FOR THE BOARD:


Paula A. Latshaw
Acting Secretary

Washington, D.C.