

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

JACOB J. GRABER )  
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 )  
 v. ) DOCKET NUMBER  
 ) NY08318110397  
 OFFICE OF PERSONNEL MANAGEMENT )  
 )

OPINION AND ORDER

Appellant's application for early retirement under 5 U.S.C. § 8336(c)(1)<sup>1/</sup> was denied in a reconsideration decision by the Office of Personnel Management (OPM) based on their finding that appellant was not entitled to law enforcement credit for his work as a Trial Attorney for the Securities and Exchange Commission (SEC) from July 1968 until the present. Appellant appealed to the Board's New York Regional Office contending that despite his official designation as Trial Attorney for SEC's Enforcement Division, the true nature of his work was the investigation of persons suspected of offenses against the criminal laws of the United States. In addition, appellant moved for summary judgment. Since OPM failed to respond to appellant's motion in a timely fashion, the presiding official did not consider its submission. She therefore, based her initial decision on the petition for appeal, appellant's Motion for Summary Judgment and the agency file.

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<sup>1/</sup> 5 U.S.C. § 8336(c)(1) provides:

An employee who is separated from the service after becoming 50 years of age and completing 20 years as a Law Enforcement Officer or Firefighter, or any combination of such service totaling at least 20 years, is entitled to an annuity.

The presiding official found that appellant had proved by a preponderance of the evidence that the work he performed for the SEC was primarily investigations of the type that would qualify him as a Law Enforcement Officer for purposes of early retirement.

In its petition for review, OPM alleges inter alia that the evidence relied on by the presiding official is not credible and therefore not legally sufficient to support her holding; that the presiding official's holding is a misinterpretation of the law; and that the presiding official exceeded her authority by granting appellant's Motion for Summary Judgment.<sup>2/</sup>

In arguing that the presiding official erred in crediting statements submitted by appellant's former supervisor's attesting to the investigative nature of appellant's work, OPM has merely stated its disagreement with the presiding official's credibility findings. The Board has held that the mere expression of disagreement with the presiding official's conclusions is insufficient to warrant review of the initial decision. Weaver v. Department of the Navy, 2 MSPB 297 (1980). Although the petition characterizes these statements as "conclusory" and "in large part self-serving" "opinion evidence", it does not demonstrate any internal inconsistencies, inherent

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<sup>2/</sup> The agency also contended that the presiding official abused her discretion in rejecting OPM's late response to appellant's Motion for Summary Judgment. 5 C.F.R. § 1201.43(c) provides presiding officials with the authority "to refuse to consider any motion or other action which is not filed in a timely fashion in compliance with this subpart." The only excuse offered by OPM for its delay in responding was the illness of the staff member to whom the duty was assigned. Under these circumstances, we hold that OPM has not shown good cause to waive the time limit set for response and the presiding official did not err in refusing to consider the submission.

improbabilities or contradiction of the evidence so as to warrant review of the presiding official's credibility finding. See Weaver, supra, at 299. The Board notes that of the four individuals whose statements were relied on by the presiding official; three are currently retired or in private practice. Thus, we fail to see how their statements as to work performed by appellant while in their employ can be deemed self-serving. Further, the fact that testimony may be self-serving does not necessarily render it untrue. Hall v. Veterans Administration, 7 MSPB 79 (1981). It is clear that appellant's immediate supervisors during the years in contention were in the best possible position to know what appellant was actually doing. Therefore, the presiding official correctly considered them in rendering her decision.

OPM's next contention is that the presiding official misinterpreted that part of the statute which defines Law Enforcement Officer to include appellant's role at the SEC.

Section 8331(2) of 5 U.S.C. defines Law Enforcement Officer to mean "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 . . ."

OPM claims that the "investigations conducted by the SEC have never been considered to be qualifying criminal investigations" and then argues that the Board should defer to the agency's interpretation of what constitutes criminal investigation.

In Ellis v. United States, 610 F.2d 760 (Ct. Cl. 1979), a case in which the Civil Service Commission had sustained OPM's decision not to grant early retirement to

firemen under the same statute involved here, the court refused to defer to OPM's statutory interpretation saying that "an administrative decision out of step with the overall statute under which it is made must be set aside." The court went on to look at the facts in that case and found the plaintiff's actual duties qualified him for early retirement.<sup>3/</sup>

Looking at the facts in the instant case, the record shows that appellant originally came to the SEC in 1967 and for the first year of his tenure there held the position of investigator. That first year was duly credited as legal enforcement work by OPM. Initial Decision at 2. Thereafter, in 1968, appellant, upon passing the bar exam, was transferred to an attorney position. However, he continued to perform substantially the same duties as before he was classified as an attorney. Appellant provided a credible explanation for being officially appointed as an attorney while still performing his investigatory duties. As an investigator, he needed permission from the staff attorney assigned to a particular case in order to perform certain tasks. As an attorney, he was able to eliminate the annoying and harmful delays that had been caused by his previous need to get specific permission. Appellant's statements are fully supported by letters and affidavits from his supervisors attesting to the fact that despite his title of "attorney", appellant primarily performed law enforcement duties involving investigations of criminal activities, the same as he had during the year he was classified as an investigator. Appellant was used extensively by the SEC to plan, organize and direct investigations involving

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<sup>3/</sup> See also Obremski v. Office of Personnel Management and Merit Systems Protection Board, 699 F.2d 1263 at 1269 (D.C. Cir 1983).

organized crime. His services were utilized in connection with field work, analysis of documents, interviewing suspects and potential witnesses, and obtaining investigative material.<sup>4/</sup>

It would be anomalous for OPM to credit appellant for these duties during the one year he was an investigator but deny him credit for all the years following during which he actually performed the same duties.

Further, OPM contends that the SEC's failure to make a finding that appellant meets the requirements for coverage (pursuant to 5 C.F.R. § 831.902) is conclusive evidence on the issue. This is completely without basis in the law. Congress expressly deleted the requirement for the employing agency's approval when it revised this statute in 1974. Employees who possess sufficient years of qualifying service are now entitled to early retirement as a matter of law.

Pub. L. No. 93-350, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. and Ad. News (88 Stat.) 355.

Therefore, we find that appellant has established by a preponderance of evidence that, from July, 1968 until the present, he performed as a law enforcement officer. See Stone v. Office of Personnel Management, 5 MSPB 142 (1981).

OPM's final contention is that the presiding official exceeded her authority by granting summary judgment. The Board finds that although the initial decision is couched in language which indicates that summary judgment is being

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<sup>4/</sup> See Corpe v. Office of Personnel Management, 3 MSPB 504 (1980), where the Board recognized that in some cases an employee's duties might not be fully described in his official position description, but if it were established that he actually performed duties which would be covered, he would receive appropriate credit.

granted, the presiding official went on to analyze the facts and weigh the evidence, so that the result was a decision on the merits and a resolution of the factual issues presented rather than a grant of summary judgment.

Under these circumstances, the Board hereby DENIES the petition. Pursuant to 5 C.F.R. § 1201.117 we REOPEN the case to MODIFY the legal analysis as noted above and, as modified, AFFIRM the initial decision.

Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the New York Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

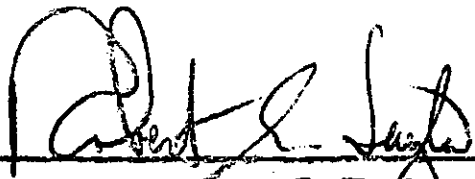
The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

APR 9 1984

(Date)

Washington, D.C.

  
Robert E. Taylor  
Secretary