U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HONG D. NGUYEN and DEPARTMENT OF THE AIR FORCE, EGLIN AIR FORCE BASE, FL

Docket No. 98-2576; Oral Argument Held January 18, 2000; Issued August 8, 2000

Appearances: *Ms. Marion Peck*, for appellant; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On June 30, 1992 appellant, a 30-year-old electronics engineer, filed a claim for benefits based on an emotional condition caused by factors of his federal employment. He applied for a transfer to a job at the employing establishment in Florida in November 1989; he had been previously employed at Wright Patterson Air Force Base in Ohio. Appellant was accepted for a new position at the employing establishment on December 6, 1989, which was a term or temporary position, and began his new job in January 1990. He alleged, however, that he did not understand prior to accepting the new, term appointment that he had lost the permanent career status rights of his previous position. Appellant stated that, after he learned in June 1990 that he no longer had a permanent status position and was therefore subject to termination whenever his term expired, he immediately began efforts to regain his permanent status. It was at this time, he alleged, that he began to experience anxiety and stress regarding his job security and encountered hostility from his supervisors, who had previously rated him as an excellent employee. Appellant, in essence, alleged that the employing establishment did not follow proper personnel procedures by failing to inform him of the consequences of his conversion and transfer in December 1989 to January 1990, and that therefore the emotional condition he sustained due to his fear of termination is compensable.

Appellant's supervisor, Jerry Simmons, the person who selected him for the term appointment, asserted in a July 29, 1992 statement that he specifically told appellant at the time of the interview for the job that the only available position was of a term nature. Mr. Simmons stated that appellant indicated that, although he and his wife had both been offered permanent

positions in the same organization at the employing establishment, he did not wish to work in the same organization as his wife and that they would be relocating to the Eglin area whether or not he was employed at the employing establishment. Appellant's term appointment expired on September 1, 1992, when he was separated from the employing establishment.

By decision dated September 24, 1992, the Office denied the claim on the grounds that the evidence of record did not establish that appellant's emotional conditions arose of the performance of duty. By letter dated October 23, 1992, appellant's attorney requested an oral hearing, which was held on March 18, 1993.

By decision dated May 27, 1993, an Office hearing representative affirmed the Office's September 24, 1992 decision finding no evidence of administrative error or abuse on the part of the employing establishment.

In a letter to appellant's attorney dated March 28, 1994, Dr. Phillip A.D. Schneider, the Assistant Director for Workforce Information with the Personnel Systems and Oversight Division of the Office of Personnel Management (OPM), responded to a question regarding whether Federal Procedural Manual, Chapter 715, subChapter 2-5a regarding employee conversions applied to appellant. This section requires a written statement from an employee converting from a permanent to a term appointment acknowledging the adverse consequences of accepting the new position prior to acceptance.[1] Dr. Schneider replied:

> "Yes. The term employment paper signed by [appellant] on January 18, 1990 ... indicates that he understood that his appointment was of limited duration. OPM recommends that agencies obtain a signed statement of understanding from an employee *prior* to a conversion (in [appellant's] case that would be prior to January 14, 1990, the effective date of his conversion). *However, there is no regulatory requirement that agencies do so*." (Emphasis added.)

When asked what would be the appropriate procedure for processing appellant's personnel action, as described in his attorney's letter, Dr. Schneider replied:

> "OPM encourages agencies that are considering an employee for conversion to new appointment to inform the employee of the rights and benefits they will lose under the new appointment. Agencies usually do this when the employee is being interviewed for the job or when the job offer is made. OPM also recommends that the agencies not effect a conversion until the employee has submitted a written statement showing he/she understands that leaving the present position

[1] Section 715.6, "voluntary separations and reductions in rank or pay, states, under subsection 2-5, under the heading, "UNNECESSARY AND INADVISABLE RESIGNATIONS." "When an employee accepts a new appointment in the same agency without a break in service, the action is processed as a conversion to the new appointment. There is no separation from federal service and the agency should not request or accept a resignation. If the employee loses rights or benefits under the new appointment, the conversion should not be effected until the employee has been informed of the conditions of the new employment and has submitted a written statement to the effect that he understands he is leaving his previous employment voluntarily to accept conversion to the new appointment."

and accepting conversion to the new appointment is voluntary. OPM has no mandatory requirements pertaining to this issue." (Underlining in original.)

By letter dated May 24, 1994, appellant's representative requested reconsideration of the May 26, 1993 decision.

By decision dated July 5, 1994, the Office denied reconsideration finding that appellant did not submit evidence sufficient to warrant modification. By letter dated June 30, 1995, appellant's representative requested reconsideration of the July 5, 1994 decision. In support of this request, appellant submitted a June 21, 1995 affidavit from Dr. Beverly C. Edmond, a former personnel specialist at the OPM, who reviewed appellant's transfer and conversion and concluded that the employing establishment made several errors and failed to follow proper procedure in processing appellant's transfer. She opined that 5 C.F.R. § 316.301[2] contained a mandatory requirement that a term appointment be made in accordance with the conditions published in the Federal Personnel Manual -- including those contained in Chapter 715.2 -- and noted that appellant was in a conversion situation where he faced a significant loss of rights, status and benefits. Dr. Edmonds specifically disagreed with Dr. Schneider's opinion that Chapter 715.2 contained no mandatory requirement to obtain prior written acknowledgment of the terms of conversion and transfer from an employee and stated that he failed to perform the necessary and complete analysis required to evaluate appellant's case.

By decision dated July 12, 1995, the Office denied reconsideration finding that appellant did not submit evidence sufficient to warrant modification. By letter dated August 10, 1995, appellant's representative requested reconsideration of the July 12, 1995 decision.

By decision dated September 20, 1995, the Office denied appellant's request for reconsideration on the basis of untimeliness. By letter dated September 20, 1995, appellant requested reconsideration, which the Office denied as untimely by decision dated January 2, 1996.

By order dated January 23, 1997 on motion of the Director, the Board found that the Office abused its discretion by not considering Dr. Edmond's June 21, 1995 affidavit, which purported to show evidence of administrative error or abuse on the part of appellant's employing establishment and found that this was evidence relevant to the issue of appellant's claim. The Board therefore remanded the case for further development and a merit decision on reconsideration.

In a March 17, 1997 memorandum, Douglas Johnson, Chief of Workforce Effectiveness for the employing establishment, asserted that appellant had not been wronged in any way during the December 1989 to January 1990 conversion process from permanent to term appointment. He stated that appellant had been advised by the personnel specialist, the supervisors involved in the courtesy interviews and the selecting supervisor that it was a term position, and had

[2] Section 316.301 states that "[a]n agency may make a term appointment for a period of more than one year, in accordance with conditions published in the Federal Personnel Manual, when the needs of the service so require and the employment need is for a limited period four years or less."

specifically informed them he would accept the term position, if offered. Mr. Johnson indicated appellant voluntarily signed the term employment agreement upon his arrival at his first day of work in January 1990, thereby acknowledging that he understood the conditions of employment in accepting the term position.

By decision dated May 7, 1997, the Office denied reconsideration finding that appellant did not submit evidence sufficient to warrant modification. The Office indicated that, with regard to appellant's conversion to a term appointment, the evidence of record did not support error or abuse in the administration of the personnel matter. The Office found that Dr. Schneider's opinion that the employing establishment did not violate any mandatory regulatory requirements had greater weight than Dr. Edmond's opinion. The Office stated:

> "Dr. Schneider was responding officially for his employer, OPM, which is the appropriate federal agency to administer and control federal personnel matters. Dr. Edmond, while having previously worked for OPM, is no longer employed with that agency, and is not in a position to respond officially for that agency."

The Office therefore concluded that appellant's reaction to his transfer and change in his employment status was not a factor of his employment and that his emotional condition therefore did not arise out of the performance of duty.

By letter received by the Office on May 1, 1998, appellant requested reconsideration of the Office's May 7, 1997 decision. In support of his request, appellant submitted an August 15, 1997 telephone deposition from Joann Hutchison, a staffing specialist, an October 24, 1997 telephone deposition from Anita Wallace, a former supervisory staffing specialist. In her deposition, Ms. Hutchison testified that when she made the job offer to appellant she only stated to him that it was "a term position and that it was not to exceed such and such a date" and indicated that she never informed him of the conditions of employment, *i.e.*, that by accepting that term position he would be losing his permanent career appointment status. She further stated that, since he did n[o]t ask any questions when the offer was made, she "assumed that he understood what he was getting into", which meant accepting a term appointment not exceeding three years. Ms. Hutchison testified that the regulation covering term employment was "315 or 316." She stated that the employing establishment began "trying to work out some way to accommodate" appellant and regain a permanent appointment when he finally realized that the Eglin position was a term appointment or a term position, and the conditions entailed by such an appointment. Ms. Hutchison indicated that she subsequently attempted, unsuccessfully, to reclaim permanent career status for appellant in June and July 1990 by obtaining an exemption to a division-wide hiring freeze. She stated that she agreed that a regulation should be strictly adhered to, particularly when it concerned a situation involving an employee who voluntarily applied for a job but whose involuntary result was his termination as a career employee. Ms. Hutchison also testified that the term employment letter signed by appellant did not cover any of his losses, as Chapter 715.2 requires and also agreed that this term employment document was not designed to comply with Chapter 715.2. When asked by appellant's attorney whether she complied with the terms of Chapter 715.2, she replied "[715-2] says that the employee *has to* submit a written statement to the effect that he understands. And I do not recall getting one of those statements...." (Emphasis added.)

Appellant also submitted new evidence in the form of deposition testimony from Ms. Wallace, dated October 24, 1997, supervisory staffing specialist when appellant applied for positions at the employing establishment. Ms. Wallace conceded that it was not usual for an employee in a "permanent career status position" to accept a term position because by doing so "they would lose their career appointment. She testified that Ms. Hutchison made her aware of the fact that "she had not advised [appellant] that he was losing his appointment, although Ms. Hutchison had "thought he understood that." When asked whether there were subsequently some attempts by her office to correct the situation, Ms. Wallace testified that the agency "tried to work with a supervisor to see if that person would go in for an exception" to the hiring freeze in effect at that time. Finally, she agreed that the Federal Personnel Manual stated that a transfer/conversion such as appellant's should not be effected until the employee has been informed of terms of the new employment, and that the Federal Personnel Manual is supposed to provide guidance to prevent this type of misunderstanding.

In addition to these two depositions, appellant submitted a handwritten note from Ms. Hutchison to Mr. Johnson dated June 29, 1990, in which she stated:

> "Anita has [a] [meeting] with [appellant] this morning. Was concerned that I never used word "appointment." I assured her that I had no idea he did not understand what he was being offered. He seemed almost desperate to get hired down here, so I figured he was willing to accept the term position regardless of the risk to his status.

Appellant also submitted a copy of an e-mail memorandum, dated July 2, 1990, from Ms. Hutchison to the division personnel director requesting that appellant be given an exemption from a hiring freeze in effect at Eglin at that time based on appellant's "hardship." The memorandum states:

> "If granted, we could place [appellant] on a permanent position regardless of the hiring freeze. This would make [appellant] a permanent employee who would be able to compete in a reduction-in-force just like any other permanent employee. He has accumulated enough service to be a career tenure employee once he is appointed or converted to a nontemporary position...."

By decision dated May 27, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board has duly reviewed the case record and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The only decision before the Board on this appeal is the Office's May 27, 1998 decision denying appellant's request for a review on the merits of its May 7, 1997 decision. Because more than one year has elapsed between the issuance of the Office's May 7, 1997 decision and

August 19, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 7, 1997 decision.[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[7]

In the present case, appellant requested reconsideration of the Office's May 7, 1997 denial of his claim that the employing establishment's failure to adhere to proper agency procedures in processing his transfer from Wright Patterson Air Force Base in Ohio to the employing establishment in Florida -- by failing to inform him of the resulting change in employment status from permanent to term appointment -- resulted in his fear of termination and a compensable, work-related emotional condition. In support of his request, appellant submitted depositions from Ms. Hutchison and Ms. Wallace which provided support for his contention that, although he was supposed to submit a signed, written statement indicating that he understood the conditions of his conversion and transfer prior to accepting the new position offered by Ms. Hutchison in her December 6, 1989 letter, pursuant to Chapter 715.2, he did not receive and sign such a statement until January 18, 1990, four days after the conversion became effective.[8] The testimony from these two employing establishment officials was further supported by two notes from Ms. Hutchison, one to Ms. Wallace dated June 29, 1990 and one to another employing establishment supervisor dated July 2, 1990, which indicated that Ms. Hutchison and Ms. Wallace were both attempting, on appellant's behalf, to correct an error made in effecting appellant's conversion and transfer by obtaining an exemption to a division-wide hiring freeze

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. §§ 8101-8193. Under Section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.138(b)(1), 10.138(b)(2)

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Joseph W. Baxter*, 36 ECAB 228, 231 (1994).

[8] In his appeal to the Board, appellant contended that he believed, based on a statement allegedly made to him by Ms. Hutchison, that, if did not sign the term employment document indicating he understood the terms of his new employment with Eglin, he would have been terminated by the employing establishment. Appellant further contended that had he known he would lose his permanent status due to the transfer he never would have accepted the resignation from his permanent position, which meant that his tenure was subject to whenever the term of the job ended. In support of this contention, appellant noted that he had checked "no" in a box on his SF-50 form/application for transfer, dated November 28, 1989, which asked whether he was willing to take a temporary job lasting 5 to 12 months, sometimes longer.

and to reemploy appellant as a permanent appointee. The Board finds that this evidence, taken together, constitutes new and pertinent evidence relevant to the issue of whether appellant experienced emotional stress as a result of administrative or agency error, thereby implicating a specific factor of federal employment.

The Director, in his rebuttal statement, argued that appellant's evidence was not new and relevant because the Office had already reviewed all of the factual evidence regarding the conversion document, and that Ms. Hutchison's memoranda merely reiterates the evidence which appellant had previously submitted regarding the employing establishment's interpretation of Chapter 715.2. However, the two notes from Ms. Hutchison, dated June 29 and July 2, 1990, were not submitted by appellant prior to his May 1, 1998 request for reconsideration. This new evidence, when viewed in conjunction with the deposition testimony of Ms. Hutchison and Ms. Wallace, support that the employing establishment may not have adequately informed appellant of the terms of his conversion and transfer prior to his acceptance of the position at Eglin on January 18, 1990, in compliance with Chapter 715.2, the applicable regulation; *i.e.*, they may not have clearly inform him that by accepting this term position he would be losing his permanent career status.[9] Ms. Hutchison addressed this situation when, at the request of appellant, she attempted to rectify the situation in her June 29 and July 2, 1990 memoranda in which she attempted to obtain an exemption from the division-wide hiring freeze so that he could regain permanent employment status. For these reasons, appellant has submitted relevant and pertinent evidence not previously considered by the Office. Therefore, the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim constituted an abuse of discretion.[10]

[9] Appellant also contended on appeal, as he did previously, that the Office erred by basing its denial of appellant request for reconsideration on Dr. Schneider's March 28, 1994 opinion, which was based on an inaccurate interpretation of Chapter 715.2, the regulation applicable to conversions. Dr. Schneider had stated in his letter that there was no mandatory regulatory requirement to inform appellant that he would lose his permanent status by signing the conversion document. Appellant contended, however, based on Dr. Edmonds' June 21, 1995 affidavit, that 5 C.F.R. § 316.301 applies to Chapter 715.2, which has the effect of making this requirement mandatory.

[10] *Carol Cherry (Donald Cherry)*, 47 ECAB 658 (1996).

The decision of the Office of Workers' Compensation Programs dated May 27, 1998 is reversed. The case is remanded to the Office for review of the merits of appellant's claim and any other proceedings deemed necessary by the Office to be followed by an appropriate decision.

Dated, Washington, D.C.
August 8, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member