DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-213346 **DATE:** March 3, 1986

MATTER OF: Franklin L. Musser - Severance Pay - Involuntary Separation

DIGEST:

An employee's voluntary transfer from career service to a temporary appointment may not be considered conclusive proof that the employee's ultimate separation at the expiration of the temporary appointment was voluntary so as to deny him severance pay. Rather, the issue of voluntariness is a question of fact to be resolved on a case-by-case basis. Here, the employee is entitled to severance pay where the record shows his separation after his temporary appointment was involuntary. Sullivan v. United States, 4 Cl. Ct. 70 (1983), affirmed 742 F.2d 628 (Fed. Cir. 1984), followed.

This decision is in response to a letter, dated August 28, 1985, from Mr. Franklin L. Musser to Representative Stan Parris, requesting that the Congressman initiate a claim on his behalf for severance pay. Representative Parris forwarded the letter to this Office for our consideration. We conclude that Mr. Musser is entitled to severance pay under the provisions of 5 U.S.C. § 5595 (1982), for reasons that follow.

FACTS

Mr. Musser began Federal employment in September 1959. Effective May 12, 1979, he resigned from a career position with the Federal Energy Regulatory Commission (FERC) in order to accept a temporary appointment with the Federal Mine Safety and Health Review Commission (the Commission). Although his position was classified as a Paralegal Specialist, the function he performed at the Commission was that of a Law Clerk for an Administrative Law Judge. There was no break in service between his separation from FERC and his appointment with the Commission. His appointment was initially for a period not to exceed May 12, 1980, but eventually it was extended to May 12, 1981. At that time, the appointment expired and Mr. Musser was separated from

the Commission. On leaving Federal service, Mr. Musser received a lump sum payment for annual leave, but was not awarded severance pay.

Section 5595(b) of Title 5, United States Code establishes the entitlement to severance pay. This section states in pertinent part:

> " * * * an employee who -
>
> > "(1) has been employed currently for a continuous period of at least 12 months; and
> >
> > "(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;
>
> is entitled to be paid severance pay * * *."

For the purpose of determining entitlement, section 5595(a) defines the term "employee" as excluding a person serving under a temporary appointment:

> " * * * except one so appointed for full time employment without a break in service of more than 3 days following service under an appointment without time limitation; * * *."
>
> 5 U.S.C. § 5595(a)(2)(ii).

In order to be considered an "employee" for the purposes of 5 U.S.C. § 5595(a)(2)(ii), the implementing regulation in 5 C.F.R. § 550.704(b)(4)(i), effective at the time of Mr. Musser's separation, imposed an additional requirement that an employee's separation from the prior tenured position must have been involuntary.

THE SULLIVAN DECISION

We earlier issued an advisory letter to Representative Parris concerning Mr. Musser's right to severance pay. B-213346, December 8, 1983. There, we stated that Mr. Musser did not appear eligible for severance pay under the regulation in 5 C.F.R. § 550.704(b)(4)(i) because his resignation from FERC appeared voluntary.

Following our correspondence with Representative Parris, the Claims Court, in Sullivan v. United States, 4 Cl. Ct. 70 (1983), aff'd per curiam 742 F.2d 628 (Fed. Cir. 1984), addressed facts similar to those presented by Mr. Musser and decided the plaintiff was entitled to severance pay. Based on Sullivan, we now reverse the opinion we expressed in B-213346, December 8, 1983, and hold that the regulation found in 5 C.F.R. § 550.704(b)(4)(i) (1985), does not provide a basis for denial of severance pay to Mr. Musser.

In Sullivan, the plaintiff was a competitive service Federal employee with the Department of Justice and the Department of Housing and Urban Development from 1966 through 1974. In 1974, without a break in service, she voluntarily relinquished her tenured position in order to accept a temporary appointment with the National Institute of Education. Although her temporary appointment was renewed at least twice, it was ultimately allowed to expire and her employment was terminated. She was denied severance pay based on 5 C.F.R. § 550.704(b)(4)(i).

The Claims Court recognized that the additional regulatory requirement imposed by 5 C.F.R. § 550.704 precluded Ms. Sullivan from coming within the definition of "employee" as that term is defined in 5 U.S.C. § 5595. It expressly considered whether the additional requirement was consistent with the statute. It found that, in writing the statute, "Congress clearly considered employees in [Ms. Sullivan's] circumstances and specifically included them in the definition of employee." 4 Cl. Ct. at 73. The court stated that the Office of Personnel Management (OPM) had improperly attempted to exclude from the statute's coverage employees which Congress had expressly intended to cover. Accordingly, it declared the regulation to be "facially inconsistent" with the statute since "it takes away what Congress clearly gave." 4 Cl. Ct. at 73.

We have informally discussed the effect of Sullivan with OPM officials. They have advised us that 5 C.F.R. § 550.704 is in the process of being rewritten and as revised, the regulation will not contain the provision which the court found improper.

Although the Claims Court held that OPM could not, through regulation, declare all employees who voluntarily transferred from tenured to temporary positions ineligible

for severance pay, it acknowledged that in order to become entitled to severance pay, an employee's ultimate separation must be involuntary. It noted that neither 5 U.S.C. § 5595 nor its implementing regulations define the term "involuntary separation." However, the court referred to OPM's own administrative definition of "involuntary separation," used in the related area of civil service retirement eligibility. Thus, Federal Personnel Manual Supplement 831-1, § S11-2a states:

> "The term 'involuntary separation' means any separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct or delinquency * * *. Note, however, that whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs rather than the methods followed or the terminology used."

Accordingly, the court concluded that the question of voluntariness is ultimately a question of fact and should be determined on a case-by-case basis.

The court examined the specific facts presented in Sullivan to determine whether Ms. Sullivan's ultimate separation from Government service was involuntary. It concluded that, despite her acceptance of a temporary position, she "never manifested any willingness or consent to leave upon the expiration of any of her temporary appointments." 4 Cl. Ct. at 76. In reaching this conclusion, the court relied on (1) Ms. Sullivan's assertions that her separation was involuntary, (2) informal promises of continued employment made by agency officials, and, (3) the fact that her appointment and those of several coworkers in similar positions were extended beyond the initial expiration dates.

SULLIVAN'S APPLICATION

After examining the record concerning Mr. Musser, we conclude that his ultimate separation from the Commission was involuntary. In reaching this decision, we rely on the following facts.

Mr. Musser characterizes his separation from Government service as involuntary. The Administrative Law Judge (ALJ) whom Mr. Musser worked for has stated that he persuaded him to leave FERC and come to the Commission because he knew of Mr. Musser's prior experience as a Paralegal Specialist. Mr. Musser indicates that he accepted the offered position with the hope and expectation that it would be made permanent. There are several documents indicating that efforts were made on Mr. Musser's behalf to have his position made permanent. During Mr. Musser's appointment, positions held by other employees performing similar work were converted to permanent status, giving greater foundation to Mr. Musser's expectation that his position would also be made permanent. In line with this expectation, the record shows that his appointment was extended 12 months beyond its initial expiration date.

In light of the record, we cannot accept the proposition that Mr. Musser's separation from the Commission was voluntary so as to preclude him from receiving severance pay. As the court did in Sullivan, we acknowledge that in many instances an employee's voluntary transfer from a tenured position to a temporary position may signal a later voluntary departure from Government service. However, we decline to apply that proposition across the board, and find it inapplicable to the facts presented in this case.

In summary, we conclude, based on Sullivan and the record before us, that Mr. Musser was an "employee" as defined in 5 U.S.C. § 5595(a), and that his separation was involuntary as required by 5 U.S.C. § 5595(b)(2). Accordingly, we hold that Mr. Musser is entitled to severance pay.

for Milton J. Socolar
Comptroller General
of the United States