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the Commission. On leaving Federal service, 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 separation, imposed an additional requirement that an employee's separation from the prior tenured position must have been involuntary.

THE DECISION

We earlier issued an advisory letter to Representative Parris concerning right to severance pay. B-213346, ✓ December 8, 1983. There, we stated that 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.

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Following our correspondence with Representative Parris, the Claims Court, in _____ 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 _____ and decided the plaintiff was entitled to severance pay. Based on _____ 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 _____.

In _____, 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 _____ 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 [_____] 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 _____ 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

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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 _____ to determine whether _____ 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) _____ 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.

APPLICATION

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

characterizes his separation from Government service as involuntary. The Administrative Law Judge (ALJ) whom _____ worked for has stated that he persuaded him to leave FERC and come to the Commission because he knew of _____ prior experience as a Paralegal Specialist. _____ 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 _____ behalf to have his position made permanent. During _____ appointment, positions held by other employees performing similar work were converted to permanent status, giving greater foundation to _____ 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 _____ separation from the Commission was voluntary so as to preclude him from receiving severance pay. As the court did in _____, 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 _____ and the record before us, that _____ 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 _____ is entitled to severance pay.

for *Milton J. Fowler*
 Comptroller General
 of the United States