

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

DAVID HATCH,
Appellant,

DOCKET NUMBERS
BN-0831-03-0056-R-1
BN-0831-03-0056-N-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 28, 2005

(CSA4075046)

William J. Lafferty, Esquire, Burlington, Massachusetts, for the appellant.

Kenneth R. Brown, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 Pursuant to 5 U.S.C. § 7703(d), the Director of the Office of Personnel Management (OPM) seeks reconsideration of the Board's final decision in *Hatch v. Office of Personnel Management*, 97 M.S.P.R. 669 (2004). OPM also requests a stay of the Board's final decision during the pendency of this petition. For the reasons set forth below, we DENY OPM's petition for reconsideration and DISMISS the stay request as moot.

BACKGROUND

¶2 The appellant began working for the Postal Service in a full-time position in September 1966. Appeal File (AF), Tab 3 (OPM response file), Subtab 3 at 3 (letter from P. Melanson). He was injured on the job on October 13, 1990 and was carried on the rolls in a leave without pay (LWOP) status for almost three years. *Id.* He received payments from the Department of Labor's Office of Workers Compensation Programs (OWCP) for this period. Effective October 12, 1993, the appellant returned to work in a limited duty assignment and was reassigned to a modified Letter Carrier position on September 6, 1995, but he was able to work for only 4 hours a day in each assignment. *Id.* Tab 6, Att. B; Tab 3, Subtab 3 at 3, 6, 7. He received OWCP payments for the remaining 4 hours of each day

for which period the agency placed him in LWOP status. *Id.* Tab 3, Subtab 3 at 3. The appellant retired effective September 3, 2002. *Id.* Tab 3, Subtab 3 at 9 (PS Form 50 documenting retirement).

¶3 OPM, in computing the appellant's annuity, determined that his service between the date he returned to work and the date of his retirement should be considered part-time service and computed his annuity in accordance with 5 U.S.C. § 8339(p)(1), which provides that an annuity is to be reduced consistent with the extent to which the annuitant's service consisted of part-time employment. *Id.* Tab 3 at 1 and Tab 3, Subtab 2 at 2. On reconsideration, OPM reaffirmed its initial conclusion regarding the computation of the appellant's annuity. *Id.* It stated that the period of time the appellant spent on the OWCP's rolls while he worked part time is not considered leave without pay and is not creditable for retirement purposes. *Id.* Tab 3 at 1. The appellant then filed an appeal with the Board's Boston Field Office.

¶4 The administrative judge concluded that the Postal Service's certification of LWOP was accurate and lawful and that the appellant was entitled to service credit for all leaves of absence he was granted since October 12, 1993 while receiving OWCP benefits. *See* Initial Decision (ID) at 14-16. The administrative judge found that OPM was required by 5 U.S.C. § 8332(f) to award the appellant retirement credit for the time during which he was on LWOP and receiving OWCP benefits. *Id.* at 16.

¶5 On OPM's petition for review of the initial decision, the Board denied the petition, reopened the appeal, and affirmed the initial decision as modified. The Board found that the appellant was properly treated as a full-time employee for retirement purposes for that period of time that he worked 4 hours a day and received OWCP benefits for the other four; that 5 U.S.C. § 8332(f) is applicable to the circumstances of this appeal; that OPM's regulation at 5 C.F.R. § 831.703(b) defining part-time and full-time service is inapplicable here; and that OPM's general guidance in Retirement and Insurance Letter 2002-21 is not entitled to deference. *See* 97 M.S.P.R. 669 ¶¶ 6-20.

¶6 The Director now petitions the Board to reconsider its final decision. Reconsideration File (RF), Tab 3. OPM argues that the Board erroneously treated part-time service as full-time service, and would require OPM to expend funds from the Federal Treasury in conflict with 5 U.S.C. § 8339(p). *Id.* at 2. The appellant has opposed OPM's request for reconsideration. RF, Tab 4.

ANALYSIS

¶7 The Director of OPM may file a petition for reconsideration of a final decision of the

Board if she determines: 1) that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management; and 2) that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. *See* 5 U.S.C. § 7703(d). The Board will consider *de novo* the arguments raised by OPM on petition for reconsideration. *Griffin v. Office of Personnel Management*, 83 M.S.P.R. 67, 72 (1999). Here OPM argues that the Board committed several errors in finding that the appellant was entitled to a recomputation of his annuity.

The Board properly treated the appellant's service from October 12, 1993, through September 2, 2002, as full-time service for purposes of retirement credit.

¶8 OPM contends that the Board erroneously treated the appellant's service from October 12, 1993, through September 2, 2002, as full-time service for purposes of retirement credit in violation of 5 U.S.C. § 8339(p), which requires proration for part-time service. RF, Tab 3 at 13-16. OPM argues that the records show that the appellant accepted an assignment to a work schedule of 4 hours a day and that the appellant conceded that he had not worked more than 4 hours a day since his return to duty. *Id.* at 14-15. In the face of this evidence, OPM faults the Board for relying on personnel documents that describe the appellant's positions as full time and, in particular, the Board's reliance on the testimony of a Postal Service human resources specialist who stated that the appellant had actually been assigned to an 8-hour position with the expectation that he would ultimately be able to work a full 8-hour day as his medical condition improved.

¶9 OPM has pointed to nothing in the record, however, which indicates that the positions to which the appellant was assigned after his return to work in October 1993, were other than full-time positions. Additionally, the human resources specialist, to whose testimony OPM now objects, testified that the classes at which the appellant was the instructor were 8-hour classes and that after the appellant taught for 4 hours, the Postal Service would bring in other employees to cover the remainder of the classes. AF, HT 1. Under these circumstances we find no error in the Board's previous determination that the appellant's service should be viewed as full-time service for purposes of retirement credit where, as here, the appellant was assigned to a full-time position, but was given leave for 4 hours a day because of his continuing medical inability to work full days. Accordingly, the Board properly declined to treat the appellant's service as part-time service pursuant to 5 U.S.C. § 8339(p).

The Board correctly interpreted 5 U.S.C. § 8332(f).

¶10 OPM argues that the Board's interpretation of 5 U.S.C. § 8332(f) ignores the literal

terms of the statute. RF, Tab 3 at 16-19. While we agree that statutes should be interpreted in a way that gives effect to all their terms, *see id.* at 17, we reaffirm our earlier interpretation of 5 U.S.C. § 8332(f) which does, in fact, give effect to its literal terms.

¶11 Section 8332(f) reads as follows:

Credit shall be allowed for leaves of absence (the Director's emphasis) without pay granted an employee while performing military service or while receiving benefits under subchapter I of chapter 81 of this title (OWCP). An employee or former employee who returns to duty after a period of separation is deemed, for purposes of this subsection, to have been in a leave of absence without pay for that part of the period in which he was receiving benefits under subchapter I of chapter 81 of this title or any earlier statute...[C]redit may not be allowed for so much of other leaves of absence without pay as exceeds 6 months in the aggregate in a calendar year.

OPM asserts that the Board did not consider the phrase "of absence" and states that the phrase limits the granting of service credit to only those employees who have been "absent" from their workplaces, i.e., not returned to duty, because of the disabling condition which led to their receipt of OWCP benefits.[1] RF at 16. OPM also argues that the statute creates an equivalence between two groups of employees who have been continuously absent from their workplace because of receipt of OWCP benefits, those who are separated and return to work and those who are not separated but whose disabilities are serious enough to require them to be absent from work. RF, Tab 3 at 17.

¶12 Here the appellant was absent, for 4 hours each day, and his absence was due to the disabling condition which led to his continued receipt of OWCP benefits for that 4 hour period. Thus, we do not understand OPM's argument that the Board failed to accord any meaning to the words "of absence" in the first sentence of 5 U.S.C. § 8332(f). OPM's interpretation adds a gloss to the words of the statute that is not required by its terms.[2] Indeed, OPM's interpretation of the term absence would actually read the term absence out of the statute for those employees who work for part of a day but who are, in fact, absent for the remainder of the day while in receipt of OWCP benefits.

¶13 OPM's reliance on the legislative history of the 1971 amendment to 5 U.S.C. § 8332(f) to support its position is similarly unhelpful. OPM notes that Congress amended the statute to end the inequitable treatment of two groups of employees who received full OWCP benefits. RF, Tab 3 at 18. Employees who were separated from their positions while receiving OWCP benefits were given no retirement credit for the period of time they were on OWCP. Yet, employees who remained on the rolls in LWOP status while receiving full OWCP benefits were given full retirement credit for the period of time they remained in LWOP status. The fact that Congress determined that the statute

contained an inequity with respect to separated employees receiving OWCP benefits provides no indication of Congress's view with respect to the grant of retirement credit to partially recovered employees who continue to receive OWCP benefits. Accordingly, we find no support in the legislative history of section 8332(f) to deny retirement service credit to the appellant.

The Board correctly determined that OPM's regulation 5 C.F.R. § 831.703 is not entitled to deference as a gap-filling regulation with respect to crediting the type of service at issue here.

¶14 OPM argues that the definition of "part-time service" in 5 C.F.R. § 831.703(b) is necessary to implement that term in 5 U.S.C. § 8339(p) and provide for the interaction of section 8339(p), relating to proration of annuities to reflect the length of total Federal service spent in part-time service, and 5 U.S.C. § 8332(f). To the extent that section 8339(p) refers to part-time service but does not define it, we agree that the section 8339(p) creates a gap that OPM may fill. We do not agree, however, that Congress left a gap with respect to crediting the type of service at issue here. For the reasons previously stated, ¶¶ 12, 13, we find no ambiguity in the words of section 8332(f). Thus a gap-filling regulation for the purpose of granting service credit for employees receiving OWCP benefits is unnecessary.

¶15 OPM also argues that the fact that it could reach a different interpretation of 5 U.S.C. § 8332(f) than the Board shows the necessity for a gap-filling regulation. RF, Tab 3 at 21. Such a claim does not, without more, indicate that the statute requires an interpretive regulation.

¶16 Further, we do not agree with OPM's assertion that the regulation is consistent with the language of the 5 U.S.C. § 8332(f). As previously stated, there is nothing in section 8332(f) limiting the type of retirement credit that can be given to an employee who is assigned to a full-time position, works 4 hours a day in that position, and is placed in LWOP status for the remaining 4 hours a day while receiving OWCP benefits.[3] To the extent the regulation is inconsistent with the plain language of section 8332(f), it is not entitled to deference. *Newman v. Love*, 962 F.2d 1008, 1012 (Fed. Cir. 1992).

The Board's decision is not in conflict with FECA[4] and the Department of Labor's implementing regulations.

¶17 OPM argues that the Board's decision finding that the appellant must be treated as a full-time employee for purposes of retirement credit is contrary to the Department of Labor's determination that the appellant was partially disabled. RF, Tab 3 at 22-24. OPM

the same weight. *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1340-41 (Fed. Cir. 2003). Specifically, it has “made clear that agency personnel policies embodied in informal sources such as handbooks and directives ... do not ordinarily merit *Chevron* deference.” *Id.*

¶16 In the present case, we see no basis for finding that Congress “explicitly left a gap” with respect to the crediting of service such as that at issue here, or that it otherwise expressly delegated to OPM the authority to promulgate regulations on that particular subject. More important, the only formally promulgated rule or regulation OPM has cited in support of its position is 5 C.F.R. § 831.703(b), in which full-time and part-time service are defined. As we have indicated above, those definitions do not support the position OPM has taken here. The only general guidance OPM has issued on the matter at issue here appears to be Retirement and Insurance Letter (RIL) 2002-21, issued on October 2, 2002, which appears to be an internal letter OPM has issued to its employees, providing guidance on the crediting of service for retirement purposes. *See* RIL 2002-21, Appeal File, Tab 3, Subtab 2 at 5-8. Such a document clearly is not entitled to *Chevron* deference. *See Roman v. Central Intelligence Agency*, 297 F.3d 1363, 1368-69 (Fed. Cir. 2002) (court referred to OPM’s *CSRS and FERS Handbook for Personnel and Payroll Offices* as “an internal handbook” and indicated that an agency’s reliance on such a document was “not ordinarily entitled to the same weight as its reliance on a regulation that was promulgated pursuant to statutory authority and following formal notice and comment proceedings”). Instead, it is accorded only “a lesser degree of deference ‘proportional to its “power to persuade,”’ depending on such factors as its thoroughness, logic, expertness, and fit with prior interpretations.” *Butterbaugh*, 336 F.3d at 1342.

¶17 RIL 2002-21 refers to employees who have been receiving OWCP benefits, who are returned to work on a schedule designated as full-time, but who in fact “work on a part-time schedule” that is “gradually increased[d] ... to full-time.” RIL 2002-21 at 2. According to the RIL, OPM “generally allows this ‘rehabilitation’ time to be credited as full-time if the employees are brought back under a full-time work schedule and are working a full-time schedule within a reasonable period of time after returning to work.” *Id.* (emphasis added). We have indicated above that the appellant’s work schedule was not increased to full-time and that the appellant in fact never worked more than 4 hours a day. Under RIL 2002-21, therefore, the appellant’s service would not appear to be creditable as full-time service.

¶18 We note, however, that the RIL provides only a very brief explanation of the reasoning on which its instructions are based. It acknowledges that, under 5 U.S.C. § 8332(f), employees who are on leave without pay while receiving OWCP benefits “are not limited

OPM also argues that the Board erred in treating the Postal Service's expectation that appellant would eventually perform full-time service at some future date as a substitute for the appellant's actual performance of a full-time work schedule. RF, Tab 3 at 26-29. The Board, however, did not base its determination that the appellant was serving in a full-time position merely on the expectation of the Postal Service that the appellant would eventually work a full-time schedule. As previously stated, the Board relied on the forms documenting the appellant's position as full-time and the testimony of a Postal Service human resources specialist who stated that the appellant's position was a full-time position and that the appellant's condition was evaluated yearly to determine whether he could increase his work hours as his condition improved.[6]

Finally, OPM argues that the Board's decision will have the potential effect of nullifying 5 U.S.C. §§ 8339(p) and 8415(e), which require proration of annuities based in part upon part-time service, and will have a negative impact on the retirement fund. RF, Tab 3 at 29-30. We recognize OPM's concern for the Retirement Fund.[7] Nevertheless, the plain language of 5 U.S.C. § 8332(f) requires that the appellant here be given retirement credit as a full-time employee. Thus, the Board's decision does not constitute a violation of 5 U.S.C. §§ 8339(p) and 8415(e). Accordingly, we DENY OPM's petition for reconsideration for the reasons set forth above and incorporate by reference, to the extent not inconsistent with the above decision, the reasoning set forth in the Board's previous decision at 97 M.S.P.R. 669.

ORDER

In view of our disposition, we DISMISS OPM's request for a stay as moot. We ORDER the agency to recompute the appellant's annuity, crediting as full-time service his employment from October 12, 1993, until the time of his retirement in September 3, 2002. OPM must complete this action no later than 20 days after the date of this decision.

We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

No later than 30 days after OPM tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the

appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. 5 C.F.R. § 1201.182(a).

||26 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

**NOTICE TO THE APPELLANT
REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>.

Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

/s/

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

[1] OPM has apparently abandoned the argument made in its petition for review that section 8332(f) covers only employees who have returned to duty after separation. *See* PFR, Tab 1 at 4.

[2] OPM appears to believe that the Board's reference to LWOP means something other than a leave of absence without pay but, as the appellant notes, LWOP is a "short hand expression for leave of absence without pay." RF, Tab 4 at 11; *see also* 5 C.F.R. § 353.102, which defines "leave of absence" as, *inter alia*, LWOP. The term leave in this context simply means that an employee has been given permission to be absent without pay. Further, the taking of leave is an "absence" even if it is measurable only in hours, as opposed to days or weeks or months. *See, e.g.*, 5 C.F.R. § 630.1202 which, for purposes of the Family and Medical Leave Act, defines "leave without pay" as an "absence from duty in a nonpay status," which may be taken in hours.

[3] Because we find that the appellant was assigned to a full-time position, OPM's regulation at 5 C.F.R. § 831.703(b) defining part-time service is inapplicable.

[4] FECA refers to the Federal Employees Compensation Act, 5 U.S.C. §§ 8101-8152.

[5] Section 10.402 states: "An injured employee who cannot return to the position held at the time of injury (or earn equivalent wage) due to the work-related injury, but who is not totally disabled for all gainful employment, is considered to be partially disabled."

Section 10.500(a) states: "Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."

[6] The Board did not rely on an interpretation of 5 C.F.R. § 353.102 for its finding that the appellant should be treated as a full-time employee for retirement credit purposes. Therefore, we need not address OPM's argument that the administrative judge incorrectly interpreted this regulation.

[7] OPM notes that an agency makes only partial payment into the retirement fund for an employee who works part-time and receives OWCP payments for the other portion of time, thereby having a negative impact on the retirement fund.