

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

62 M.S.P.R. 296

Docket Number SE-0846-94-0068-I-1

NOREEN N. TANAKA, Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, Agency.

Date:

Noreen N. Tanaka, Camp Zama, Japan, pro se.

Joy C. Anderson, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has petitioned for review of the December 29, 1993, initial decision that affirmed an October 15, 1993, reconsideration decision of the Office of Personnel Management (OPM) denying the appellant's belated request to elect coverage under the Federal Employees Retirement System (FERS). For the reasons discussed below, we GRANT the petition under 5 U.S.C. S 7701(e) and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still AFFIRMING OPM's reconsideration decision.

BACKGROUND

The appellant has been employed by the Department of the Army since June 14, 1973. See Initial Appeal File (IAF), Tab 4, Subtab 5. None of the appellant's appointments, however, were subject to coverage under the Civil Service Retirement System (CSRS). See Initial Decision (I.D.) at 2. Rather, during her employment with the Department of the Army, the appellant has made only FICA contributions to the Social Security System. See IAF, Tab 4, Subtab 5; I.D. at 2.

In September 1990, the appellant filed a request with her employing agency to elect coverage retroactively under FERS. See IAF, Tab 4, Subtab

5. The agency approved her request and issued an SF-50 changing her retirement plan effective January 1, 1987, from FICA only to both FERS and FICA. *See id.*, Tab 1. When the agency subsequently determined that it lacked the authority to accept the election, the appellant requested OPM to consider her belated election of coverage under FERS. *See id.*, Tab 4, Subtab 3.

In its reconsideration decision, OPM denied the appellant's request, stating that it did not have the legal authority to accept a belated FERS election from an employee who had the opportunity to elect FERS coverage during the open season that ran from July 1, 1987, through December 31, 1987, or during the six-month period January 1, 1988, through June 30, 1988, following that open season. *See id.*, Tab 4, Subtab 2.

The administrative judge affirmed OPM's reconsideration decision, finding that OPM is without authority to consider the appellant's belated election. On petition for review, the appellant argues that OPM has such authority.

ANALYSIS

In finding that OPM lacked the authority to approve the appellant's belated election, the administrative judge relied on *Killip v. Office of Personnel Management*, 991 F.2d 1564 (Fed. Cir. 1993). The appellant argues that *Killip* is distinguishable from this appeal because the employee in *Killip* was covered under CSRS before and during the six-month open season, while she was never subject to CSRS. We agree that the administrative judge did not address this point. However, for the reasons discussed below, we find that OPM lacks the authority to consider the appellant's belated election of FERS coverage.

On June 6, 1986, Congress enacted the Federal Employees' Retirement System Act (FERSA) creating FERS as an alternative to the CSRS benefits program. See Pub.L. No. 99-335, 5 U.S.C. SS 8401-8479, *reprinted in* 1986 U.S.C.C.A.N. (100 Stat.) 514. Under section 301(a)(1)(A) of FERSA, Federal employees who, as of June 30, 1987, were covered under CSRS could elect to transfer from CSRS to FERS, but only if that election were made during the six-month open season extending from July 1, 1987, through December 31, 1987, as provided for in section 301(a)(1)(B) of the Act. See 1986 U.S.C.C.A.N. (100 Stat.) at 599; *Killip*, 991 F.2d at 1565.

Section 301(a)(3)(A)(i) of FERSA provides, in pertinent part, that an employee who was not subject to CSRS as of December 31, 1986, "may, during the 6-month period described in subsection (a)(1)(B) ... elect to become subject to [FERS]." See 1986 U.S.C.C.A.N. (100 Stat.) at 599-600. It is undisputed that the appellant was not subject to CSRS as of December 31, 1986. The appellant therefore was required under the statute to elect

FERS coverage during the six-month period set forth in section 301(a)(1)(B) of FERSA, i.e., during the open season extending from July 1, 1987, through December 31, 1987. This she did not do.

Under OPM regulation, a belated FERS election could be accepted by an employing agency until June 30, 1988, in a situation where the employee was "unable, for cause beyond his or her control," to elect FERS coverage by the December 31, 1987, statutory deadline. See 5 C.F.R. § 846.204(a); *Killip*, 991 F.2d at 1567. The appellant contends that she was unable to elect FERS coverage during the open season because her employing agency did not notify her of her eligibility to elect FERS coverage during that period, and that she first learned of her potential FERS eligibility in September 1990. See IAF, Tab 4, Subtab 5. The Department of the Army does not dispute the appellant's assertion that it failed to notify her of her opportunity to elect FERS coverage during the open season. See *id.*, Tab 4, Subtab 5. Nonetheless, OPM lacks the authority under its regulation to consider the appellant's belated election request because the request was made after the July 1, 1988, deadline set forth in the regulation. See *Killip*, 991 F.2d at 1567.

Congress has not established another statutory open season, nor has OPM promulgated any further regulation on the subject of belated FERS elections. See *id.* at 1567-68. We have found no statute or regulation that would allow OPM to consider the appellant's belated request, nor has she cited any such statute or regulation. Accordingly, we conclude that OPM does not have the authority under statute or regulation to accept the appellant's belated election of FERS coverage. See *id.* at 1570.

The appellant argues that the Federal Personnel Manual (FPM) and equity confer authority on OPM to consider her belated election. The U.S. Court of Appeals for the Federal Circuit considered the FPM in the context of belated elections and concluded that the FPM does not constitute a basis for validating OPM's acceptance of an election made after June 30, 1988. See *Killip*, 991 F.2d at 1569-70. And, OPM cannot consider the appellant's belated election under FERSA based on the equitable claims in this appeal. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990) (the government cannot be estopped from denying benefits not otherwise permitted by law even if the claimant was denied monetary benefits because of his reliance on the mistaken advice of a government official).

Accordingly, we find that OPM is without authority to consider the appellant's belated request that she be permitted to elect coverage under FERS. See *Killip*, 991 F.2d at 1570.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.