UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 136

Docket No. CB-7121-09-0014-V-1

Patrick Ryan,

Appellant,

v.

Department of Homeland Security,

Agency.

July 20, 2009

Joe Goldberg, Washington, D.C., for the appellant.

J. Douglas Whitaker, Esquire, Omaha, Nebraska, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a request for review of an arbitrator's decision denying his grievance of the agency's action placing him on enforced leave without pay. The Board GRANTS the appellant's request for review under 5 U.S.C. § 7121(d), and DISMISSES the request for review without prejudice to refiling.

DISMISSAL WITHOUT PREJUDICE

¶2 The Board has jurisdiction to review an arbitration decision under 5 U.S.C. § 7121(d) only when the subject matter of the grievance is one over which the Board has jurisdiction, the employee alleges discrimination under 5 U.S.C.

§ 2302(b)(1) in connection with the underlying action, and a final decision has been issued by the arbitrator. *Godesky v. Department of Health & Human Services*, 101 M.S.P.R. 280, ¶ 5 (2006). All of these conditions have been satisfied in this case. The subject matter of this appeal, the appellant's involuntary placement on enforced leave, is tantamount to an indefinite suspension without pay for more than 14 days and falls within the Board's jurisdiction under 5 U.S.C. § 7513. *Pittman v. Merit Systems Protection Board*, 832 F.2d 598, 598-600 (Fed. Cir. 1987). In addition, the appellant alleged before the arbitrator, and now alleges before the Board, that the agency's action constituted disability discrimination in violation of 5 U.S.C. § 2302(b)(1)(D). Finally, the arbitrator issued a final decision on the appellant's grievance on February 28, 2009. Thus, we find that the Board has jurisdiction over this case.

¶3 After the filing of the request for review, the parties submitted a document entitled "SETTLEMENT AGREEMENT" dated July 1, 2009. Request for Review File, Tab 7. The document provides, among other things, for the dismissal of the request for review without prejudice to refiling to allow the appellant an opportunity to apply for disability retirement benefits from the Office of Personnel Management (OPM). *Id.* The settlement agreement further states that it is the parties' intention that the request for review will be dismissed with prejudice to refiling in the event that OPM approves Mr. Ryan's disability retirement application. *Id.*

¶4 In general, a dismissal without prejudice is a procedural option available to the Board's administrative judges when the circumstances of a case warrant such an action. *See Jones v. Department of Health & Human Services*, 52 M.S.P.R. 669, 672 (1992). Further, the Board has held that an administrative judge may dismiss an appeal without prejudice where such a dismissal is in the interest of fairness, due process, and administrative efficiency. *See e.g., Gidwani v. Department of Veterans Affairs*, 74 M.S.P.R. 509 (1997); *Bowens v. Office of Personnel Management*, 59 M.S.P.R. 390, 392 (1993). In particular, the Board's

administrative judges have dismissed cases without prejudice pending decisions and actions that are not before the Board and over which the Board has no control. Those Board decisions generally involve dismissals pending completion of criminal proceedings and, as in this case, retirement matters. *See Wilson v. Department of Veterans Affairs*, 102 M.S.P.R. 70, ¶ 12 (2006); *Hodges v. Office of Personnel Management*, 101 M.S.P.R. 212, ¶ 14 (2006). When reviewing decisions of arbitrators or administrative judges, the Board has not typically dismissed cases without prejudice; however, we find that such a dismissal is appropriate here because it is in the interest of fairness, due process, and administrative efficiency for the parties to resolve this matter as set forth in their settlement agreement.

¶5 Before dismissing a matter as settled, the Board must decide whether the parties have entered into a settlement agreement, understand its terms, and intend to have the agreement entered into the record for enforcement by the Board. *See Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 149 (1988). We find here that the parties have, in fact, entered into a settlement agreement, that they understand the terms, and that they agree that the agreement will be entered into the record for enforcement by the Board. *See* Request for Review File, Tab 7.

¶6 Accordingly, the appellant's request for review is dismissed without prejudice to refile until **November 10, 2009**. The Board will refile the request for review on its own motion on that date, and will inform the parties of that fact. Upon refiling the request for review will be processed from the point at which the dismissal was granted.

¶7 This is the final order of the Merit Systems Protection Board in this request for review. Title 5 of the Code of Federal Regulation, section 1201.113 (5 C.F.R. § 1201.113)

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, www.cafc.uscourts.gov. 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:

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William D. Spencer
Clerk of the Board
Washington, D.C.