UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 28

Docket No. AT-4324-09-0438-I-1

Walter Vidal,

Appellant,

v.

Department of Justice,

Agency.

February 5, 2010

Kiley D. Scott, Esquire, Albany, New York, for the appellant.

Elizabeth K. Blackmon, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency petitions for review of the initial decision granting the appellant's request for relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). For the reasons set forth below, the Board DENIES the agency's petition for review, REOPENS the case on its own motion pursuant to 5 C.F.R. § 1201.118, VACATES the initial decision, and DISMISSES the appeal as moot.

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency violated USERRA by charging him military leave on unspecified nonwork days, which caused him to use an unspecified amount of annual leave, sick leave, or leave without pay in order to perform his military duty. Initial Appeal File (IAF), Tab 1. The agency requested and obtained documentation of the appellant's claim, and, based on that documentation, it agreed to pay the appellant for four days it said had been identified by the appellant's representative as the dates at issue in the appeal. IAF, Tab 7 at 4. It asserted further that it had "initiated action to pay [the] appellant for the four days (32 hours)," and that it would supply evidence of its action when that action was complete. *Id.* The agency also moved to have the appeal dismissed as moot because the appellant "will be obtaining all the relief he could have obtained had he prevailed before the Board . . . ." *Id.* at 5. Without holding the hearing that the appellant requested, the administrative judge to whom the appeal was assigned granted the appellant's request for corrective action. IAF, Tab 8, Initial Decision (ID) at 1; *see id.*, Tab 1 at 1. He denied the agency's motion to dismiss the appeal as moot, however, because the agency had not submitted evidence that it had actually paid the appellant. ID at 2.

¶3 The agency argues on petition for review that the administrative judge erred in denying its motion to dismiss the appeal as moot. Petition for Review File (PFRF), Tab 1 at 6-7. It also has filed two documents that it claims show that the appellant has been paid for the four days on which he allegedly was improperly required to take leave other than military leave in order to perform military duties. *Id.*, Tab 2 at 3-5. The appellant has not responded to the petition.

ANALYSIS

¶4 The Board's jurisdiction is determined by the nature of an agency's action against a particular appellant at the time an appeal is filed with the Board, and an

agency's unilateral modification of its action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture, or unless the agency completely rescinds the action being appealed. *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981). When an agency cancels or rescinds an action after the action has been appealed, the Board may dismiss the appeal as moot. *Haskins v Department of the Navy*, 106 M.S.P.R. 616, ¶ 15 (2007), *review dismissed*, 267 F. App'x 934 (Fed. Cir. 2008). For an appeal to be rendered moot, an appellant must receive all of the relief that he could have received if the matter had been adjudicated and he had prevailed. *See, e.g.*, *Murphy v. Department of Justice*, 107 M.S.P.R. 154, ¶ 6 (2007). An agency's expression of its intent to provide such relief is not sufficient to establish that the appeal is moot. *Haskins*, 106 M.S.P.R. 616, ¶¶ 15-23. An appeal is not truly moot until all appropriate relief has been provided. *Id.*, ¶ 22

¶5 The record does not indicate that the appellant has consented to the divestiture of jurisdiction over his appeal. Moreover, although the agency expressed its intention of paying the appellant for the leave he allegedly was improperly charged, the record indicates that it had not taken this action at the time it filed its motion to dismiss the appeal. *See* IAF, Tab 7 at 4 (the agency's statement that it was "unable to process the action immediately"). The appeal therefore was not moot at that time, and we accordingly find no error in the administrative judge's denial of the agency's motion to dismiss it as moot. *See Haskins*, 106 M.S.P.R. 616, ¶ 22.

¶6 The agency appears to object to the administrative judge's having contacted the appellant's representative by telephone, on an ex parte basis, to inquire about whether the appellant intended to respond to the agency's motion. *See* PFRF, Tab 1 at 6. Ex parte communications regarding procedural matters such as whether a party plans to file a response are not prohibited. *See Fitzpatrick v. Department of Justice*, 91 M.S.P.R. 556, ¶ 16, *review dismissed*, 52 F. App'x 148 (Fed. Cir. 2002). We note that the appellant's representative

appears to have stated during this telephone communication that he regarded "the agency's planned corrective action [as] in accordance with the materials submitted by [the] appellant to the agency." ID at 2 n.1. To the extent this statement can be regarded as an improper ex parte communication, however, nothing in the record suggests that the administrative judge's failure to provide the agency with an opportunity to respond to it has prejudiced the agency's substantive rights. *See Lewis v. Office of Personnel Management*, 87 M.S.P.R. 275, ¶ 7 n.2 (2000); 5 C.F.R. § 1201.103(b).[1]

¶7 For the reasons stated above, we DENY the agency's petition for review. We REOPEN this appeal, however, to address evidence that the appeal is now moot.

¶8 We have noted above that the agency advised the administrative judge that it intended to pay the appellant for leave he allegedly took on four dates, and that it has asserted on review that this action has been taken. The statement that the appellant's representative reportedly made when the administrative judge contacted him by telephone, and that is described above, seems to suggest that the dates for which the agency has now paid him are the only dates at issue in this appeal. *See* ID at 2 n.1. Because the record included no written statement by the appellant or his representative on this subject, however, the Office of the Clerk of the Board issued an order requiring the appellant to identify any additional dates on which he allegedly was improperly required to take leave. PFRF, Tab 4 at 1. The order included a statement that, if the appellant failed to file a timely response, the Board might assume that there were no such additional dates. *Id.* at 2.

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[1] In light of our finding below that the appeal is now moot, we need not address the agency's argument on review that the administrative judge should not have closed the record without providing it an opportunity to submit evidence that it had taken the action it described in its motion to dismiss. *See* PFRF, Tab 1 at 6.

¶9 The appellant has filed no response to the order described above. We therefore find that the four dates for which the agency has paid the appellant are the only dates at issue in this appeal. We also note that the appropriate remedy for the agency's improperly requiring the appellant to use military leave on nonworkdays would be an order that the agency compensate the employee for any loss of wages suffered by the employee as a result of this requirement. *See Murphy*, 107 M.S.P.R. 154, ¶ 8.[2] Because the agency in this case has submitted evidence that it has provided this compensation, the appeal is now moot. *See Haskins*, 106 M.S.P.R. 616, ¶ 21.

¶10 Accordingly, the appeal is DISMISSED.

ORDER

¶11 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 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

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[2] In *Murphy*, 107 M.S.P.R. 154, ¶ 8, the Board indicated that the agency could be ordered to compensate the employee "for any loss of . . . benefits" the employee suffered as a result of the violation, and in *Pucilowski v. Department of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007), our reviewing court held that the Board also had the authority to order an agency to correct its records to restore military leave to an appellant. In the case now before us, however, the appellant is no longer employed by the agency. *See* IAF, Tab 7 at 4. Moreover, he indicated in his appeal that his military service ended in 1999. *Id.*, Tab 1 at 1. An order for the restoration of the military leave the appellant allegedly used on nonworkdays, or for the restoration of leave he was improperly required to use, therefore would not be appropriate.

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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.