UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 114

Docket No. AT-4324-10-0016-I-1

Larry J. Green, Sr.,

Appellant,

v.

Department of the Air Force,

Agency.

June 22, 2010

Derrick T. Hogan, Esquire, Albany, New York, for the appellant.

Major Jeffrey A. Vires, Eglin Air Force Base, Florida, 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 this appeal alleging that the agency improperly charged him military leave on non-workdays, which caused him to use annual leave, sick leave, or leave without pay to perform military duty, in violation of his rights as explicated in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). Initial Appeal File (IAF), Tab 1 at 1. In response to an order to provide records in support of his claim, the appellant submitted date-specific documentation and supporting military leave records indicating that he had been forced to take another form of leave to participate in military duty on 13 days. IAF, Tab 3 at 2, Tab 8. Upon reviewing the appellant's submissions, the agency notified the appellant and the administrative judge that it would pay $2,563.60 to the appellant in compensation for the 13 days of leave at issue. IAF, Tab 11 at 4. The agency also requested a continuance until it could provide proof of payment "at which time this appeal will become moot and should be dismissed." *Id*. at 5.

¶3 During the prehearing conference, the agency reasserted its request to continue the scheduled hearing date to allow time to pay the appellant the agreed upon amount. IAF, Tab 15 at 2. In response, the appellant's representative objected to the continuance, which he viewed as the agency's attempt to prevent the appellant from obtaining attorney fees. *Id*. at 3. The agency moved to dismiss the appeal as moot and submitted a copy of a pay adjustment from the Defense Finance and Accounting Service (DFAS) as proof that it had already requested that DFAS pay the appellant the agreed upon amount. IAF, Tab 14 at 4-5, Tab 15 at 2. The administrative judge denied the agency's request for a continuance and ordered the appellant to show cause as to why his appeal was not ripe for dismissal as moot. IAF, Tab 15 at 2. In response, the appellant conceded that the $2,563.60 payment is the full relief to which he is entitled, but argued that the administrative judge should not dismiss his appeal as moot because he had not yet received payment from the agency. IAF, Tab 16 at 2.

¶4 Without ruling in advance on the mootness issue, the administrative judge held the scheduled hearing on the merits of the appellant's *Butterbaugh* claim. IAF, Tab 17 at 1. The administrative judge found that the appellant had satisfied his burden of proof based on the "extensive documentary evidence he submitted into the record" and issued an initial decision granting the appellant's request for corrective action under USERRA. *Id*. at 1, 7-8. The administrative judge also found that the appellant's claim was not moot because it was undisputed that the appellant had not received payment in full on or before the dates of the hearing and the issuance of the initial decision. *Id*. at 5.

¶5 The agency has filed a petition for review arguing, among other things, that the administrative judge should have dismissed the appeal as moot. Petition for Review (PFR) File, Tab 1 at 6-9, 11. The agency asks the Board to set aside the initial decision and dismiss the appeal as moot because it has provided the appellant with "all the relief to which he was entitled." *Id*. at 12. The appellant has responded in opposition to the petition. PFR File, Tab 3.

¶6 The parties' submissions on review suggest that the appellant might have received the payment after the administrative judge issued the initial decision. PFR File, Tabs 1, 3. Because the record was not conclusive on this issue, the Board ordered both parties to provide evidence documenting whether the appellant has received payment in full satisfaction of his claim. PFR File, Tab 4 at 2. The Board also ordered the parties to file any evidence or argument that the Board should not now dismiss the appeal as moot. *Id*. The parties did not respond to the order.

ANALYSIS

¶7 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. *Vidal v. Department of Justice*, 113 M.S.P.R. 254, ¶ 4 (2010). When an agency cancels or rescinds an action after the action has been appealed, the Board may dismiss the appeal as moot. *Id.* 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. *Id.* An agency's expression of its intent to provide such relief is not sufficient to establish that the appeal is moot. *Id.*; *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶¶ 15-23 (2007), *review dismissed*, 267 F. App'x 934 (Fed. Cir. 2008). An appeal is not truly moot until all appropriate relief has been provided. *Vidal*, 113 M.S.P.R. 254, ¶ 4; *Haskins*, 106 M.S.P.R. 616, ¶ 22.

¶8 The record below indicates that the appellant initially did not consent to the divestiture of jurisdiction over his appeal. Moreover, it is undisputed that DFAS had not paid the appellant when the agency filed its motion to dismiss the appeal as moot or by the date of the hearing on the appellant's *Butterbaugh* claim. IAF, Tab 16 at 2; PFR File, Tab 1 at 4-9, Tab 3 at 6. The appeal therefore was not moot at that time, and we find no error in the administrative judge's denial of the agency's motion to dismiss the appeal as moot. *See Vidal*, 113 M.S.P.R. 254, ¶ 5. For this reason, we DENY the agency's petition for review.[*]

¶9 We REOPEN this appeal, however, to address evidence that the appeal is now moot. As noted above, we ordered the parties to submit any evidence or argument that the Board should not dismiss this appeal as moot because the appellant has not received all of the relief to which he is entitled. PFR File, Tab 4 at 2. The appellant did not respond although the Board informed him that we

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[*] In light of our finding below that the appeal is now moot, we need not address the agency's arguments on review that: (1) the administrative judge abused his discretion in denying the agency's request to continue the scheduled hearing on the merits until after the appellant received payment for his *Butterbaugh* claim; and (2) the administrative judge erred in considering as an admission certain statements that the agency made for settlement purposes. PFR File, Tab 1 at 7, 9-12; *see Vidal*, 113 M.S.P.R. 254, ¶ 6 n.1.

might treat his failure to do so as an admission that he received payment in full and has no opposition to the agency's request to set aside the initial decision and dismiss this appeal as moot. *Id*. Based on the appellant's failure to respond to our order, we find that the appellant is no longer claiming that he has not received the payment, which he conceded is the full relief he could have received on his claim. IAF, Tab 16 at 2. Moreover, the record indicates that the appellant should have received payment within days of the issuance of the initial decision. IAF, Tab 14 at 4-5; PFR File, Tab 1 at 16-18; *see also* PFR File, Tab 1 at 10 (the agency's unrebutted assertion that it informed the administrative judge on the morning of the hearing that a check was to be issued to the appellant on the next business day). Therefore, under the circumstances, we find that the appellant has received all of the relief that he could have received if he prevailed in his appeal. *See Vidal*, 113 M.S.P.R. 254, ¶ 9; *Alexis v. Office of Personnel Management*, 106 M.S.P.R. 315, ¶¶ 4-5, 7 (2007). Thus, there is no further relief the Board can grant in this case and the appeal is now moot. *See Vidal*, 113 M.S.P.R. 254, ¶ 9; *Alexis*, 106 M.S.P.R. 315, ¶ 7.

¶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

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.