

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

2010 MSPB 146

Docket No. DC-0752-09-0149-N-1

**David P. Gessert,
Appellant,**

v.

**Department of the Treasury,
Agency.**

July 16, 2010

David P. Gessert, Washington, D.C., pro se.

John F. Schorn and Kristie C. Bowers, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's motion to stay the Board's final decision in *Gessert v. Department of the Treasury*, [113 M.S.P.R. 329](#) (2010), pending the disposition of his appeal of that decision to the U.S. Court of Appeals for the Federal Circuit. For the reasons set forth below, the appellant's motion is dismissed.

BACKGROUND

¶2 Because the agency determined that the appellant had been promoted to the GS-14 grade level due to an administrative error and without legal authority, it

corrected the appellant's illegal promotion and returned him to his prior GS-13 grade-level position. *Id.* at ¶ 4. The appellant filed a Board appeal challenging the agency's action on December 7, 2008. *Gessert*, Initial Appeal File, Tab 1. The Board's administrative judge reversed the agency's action, finding that the agency failed to establish that the promotion was contrary to law or regulation, and that the Board therefore had jurisdiction over the appeal. *Gessert*, Initial Decision (Aug. 11, 2009). On review, the Board reversed the initial decision and dismissed the action. The Board found that the appellant's promotion was, in fact, an error contrary to law or regulation, and that the Board was, therefore, without jurisdiction over the agency's action correcting that error.

¶3 On February 24, 2010, the appellant filed a motion to stay the Board's final decision pending appeal to the Court of Appeals for the Federal Circuit. Granting the request would have the effect of reinstating the interim relief the appellant had been receiving pursuant to the administrative judge's initial decision. The appellant alleges, inter alia, that without the stay, he would undergo irreparable harm because he would suffer "significant financial hardship" and "be effectively prohibited from benefiting from the time-in-grade at the GS-14 level ... when [he applies] for other employment with the Federal Government." *Gessert*, MSPB Docket No. DC-0752-09-0149-N-1, Stay File, Tab 1. The agency responded arguing that the Board lacks jurisdiction to grant stay relief. *Id.*, Tab 2.

ANALYSIS

¶4 Generally, the Board has the discretion to stay the enforcement of a final decision pending judicial review or reconsideration. *See Moscato v. Department of Education*, [75 M.S.P.R. 261](#), 262 (1997). In entertaining a stay request, the Board ordinarily considers four factors: (1) whether the stay applicant has made a strong showing that he or she is likely to prevail on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether the issuance of the stay will substantially harm the other parties interested in the proceeding; and (4)

where the public interest lies. *See Special Counsel v. Byrd*, [60 M.S.P.R. 649](#), 651 (1994), *citing Hilton v. Braunskill*, [481 U.S. 770](#), 776 (1987).

¶5 Once the Board has determined that it is without jurisdiction to entertain the appellant's appeal, the Board does not have jurisdiction to make any other determinations or grant any relief with regard to that appeal. *See Moscato*, 75 M.S.P.R. at 263. Because the Board's final decision in the appellant's appeal was a dismissal for lack of jurisdiction, and not a determination on the merits of his alleged reduction in grade and pay, the Board does not have the authority to examine the factors for a stay with regard to appellant's appeal. *Id.* Accordingly, we must dismiss the appellant's motion for a stay.

FOR THE BOARD:

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