UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 177

Docket No. DE-0752-08-0289-A-1

Raymond Sanchez, Jr.,

Appellant,

v.

Department of Homeland Security,

Agency.

August 26, 2010

Thomas F. Muther, Jr., Esquire, Denver, Colorado, for the appellant.

Michael N. Spargo, Esquire, Williston, Vermont, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the addendum initial decision that denied his request for attorney fees. For the reasons set forth below, we GRANT the appellant's petition for review and AFFIRM the addendum initial decision AS MODIFIED in this Opinion and Order.

BACKGROUND

¶2 The appellant was originally removed from his position as a Criminal Investigator with Immigration and Customs Enforcement, effective October 28, 2006, based on charges of off-duty misconduct that occurred in 2001. *See*

Sanchez v. Department of Homeland Security, 110 M.S.P.R. 573, ¶ 2 (2009). He appealed to the Board, and the Board dismissed the appeal as settled pursuant to a settlement agreement. *Id.*, ¶¶ 2-3; Attorney Fees File (AFF), Tab 6, Subtab 9. The settlement agreement provided for, inter alia, the appellant's reinstatement and placement on LWOP for a set period of time. The Board entered the agreement into the record for enforcement purposes.

¶3 The agency subsequently removed the appellant a second time based on a new, but related, misconduct charge. AFF, Tab 6, Subtabs 4-6, 8. The appellant filed both an appeal of his second removal and a petition for enforcement of the settlement agreement reached in his appeal of his first removal. *Sanchez*, 110 M.S.P.R. 573, ¶ 5; Initial Appeal File (IAF), Tab 1. The parties agreed to dismiss the appeal of the second removal without prejudice, pending the outcome of the petition for enforcement. IAF, Tab 4. The Board determined that the second removal action constituted a material breach of the settlement agreement, and it ordered the agency to cancel the second removal, reinstate the appellant, and place him back on LWOP for the agreed-upon period of time. *Sanchez*, 110 M.S.P.R. 573, ¶¶ 9-12.

¶4 The administrative judge then reinstated the second removal appeal. Refiled Appeal File (RAF), Tab 1. In the initial decision, the administrative judge found, based on the parties' agreement, that the appeal was moot because the appellant had received all of the relief that he could have received had he adjudicated his appeal and prevailed. RAF, Tab 3 at 2. He thus dismissed the second removal appeal as moot. *Id.* at 1-3.

¶5 Thereafter, the appellant's attorney filed the instant request for attorney fees in connection with his appeal of the second removal action. AFF, Tab 1. After affording the parties an opportunity to submit evidence and argument concerning their respective positions and considering their responses, the administrative judge issued an addendum initial decision in which he found that

the appellant's request for attorney fees was barred by a provision in the agreement settling the first removal appeal. AFF, Tab 9 at 3-4.

¶6 The appellant has filed a petition for review and the agency has filed a response in opposition. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶7 As noted above, the administrative judge dismissed the appeal underlying this request for attorney fees as moot. RAF, Tab 3. That initial decision became the final decision of the Board on June 30, 2009, when neither party filed a petition for review by that date. *Id.* at 2. It is by now well settled that the dismissal of an appeal as moot amounts to a dismissal for lack of jurisdiction. *See Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 17 (2007), *review dismissed*, 267 F. App'x 934 (Fed. Cir. 2008). Where an appeal is dismissed for lack of jurisdiction, the Board is without the authority to order any relief and no order exists for it to enforce. *See Antonio v. Department of the Air Force*, 107 M.S.P.R. 626, ¶ 12 (2008); *Haskins*, 106 M.S.P.R. 616, ¶ 17. Thus, the appellant did not receive any relief in this case and he is not a prevailing party in this case. Because the appellant has not established that he is a prevailing party in this case, he is not entitled to an award of attorney fees in this case. 5 U.S.C. § 7701(g)(1); *Wightman v. Department of Veterans Affairs*, 111 M.S.P.R. 109, ¶ 7 (2009); *McKenna v. Department of the Navy*, 104 M.S.P.R. 22, ¶ 5 (2006). To the extent that the appellant could be entitled to any attorney fees, it can only be as a result of the relief he obtained in his petition for enforcement, and he must request fees in connection with that case.

¶8 The appellant argues that his success in his petition for enforcement renders him a prevailing party in this case because this case is inextricably intertwined with his petition for enforcement. PFR File, Tab 1, PFR at 7-15. In effect, the appellant asserts a modified catalyst theory under which he obtains prevailing party status in this case if the agency has involuntarily rescinded its

action in this case as a result of a Board order entered in a separate case that involves the same agency action. We are not persuaded by this argument.

¶9 In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), the Court noted that prevailing parties are not generally entitled to collect attorney fees from the losing party and courts will not award fees to a prevailing party absent explicit statutory authority. 532 U.S. at 602. The Board has the authority to award attorney fees in adverse action cases pursuant to 5 U.S.C. § 7701(g)(1). To establish entitlement to an award of attorney fees, an appellant must show that: (1) He is the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. 5 U.S.C. § 7701(g)(1); *Wightman v. Department of Veterans Affairs*, 111 M.S.P.R. 109, ¶ 7 (2009); *McKenna*, 104 M.S.P.R. 22, ¶ 5.

¶10 The Board has held, consistent with *Buckhannon*, that:

> a party may be considered to have prevailed under a fee-shifting statute that requires prevailing party status only if the party obtained an "enforceable judgment[]" resulting in a "'material alteration of the legal relationship'" between the parties.

McKenna, 104 M.S.P.R. 22, ¶ 6 (quoting *Buckhannon*, 532 U.S. at 604); *see also Sacco v. Department of Justice*, 90 M.S.P.R. 225, ¶ 7 (2001), *aff'd*, 317 F.3d 1384 (Fed. Cir. 2003). An appellant who shows that he obtained a material alteration of the legal relationship between the parties through an enforceable final judgment on the merits or a settlement agreement entered into the record for the purposes of enforcement by the Board is a "prevailing party" for the purposes of 5 U.S.C. § 7701(g)(1). *See Sacco v. United States*, 452 F.3d 1305, 1308-10 (Fed. Cir. 2006); *Miller v. Department of the Army*, 106 M.S.P.R. 547, ¶ 7 (2007); *Del Prete v. U.S. Postal Service*, 104 M.S.P.R. 429, ¶ 6 (2007); *McKenna*, 104 M.S.P.R. 22, ¶ 6; *Griffith v. Department of Agriculture*, 96 M.S.P.R. 251, ¶¶ 7-11 (2004).

¶11 The appellant's assertion that he is a prevailing party in this case because he received "relief" in this case as a result of the Board's order in the compliance case is unavailing. Quite simply, his appeal was dismissed as moot, and there is nothing that the Board can enforce. Thus, nothing that happened in the adjudication of this appeal resulted in a material alteration of the legal relationship between the parties. *See McKenna*, 104 M.S.P.R. 22, ¶ 2 (prevailing party status requires an enforceable judgment resulting in a material alteration of the legal relationship between the parties) (quoting *Buckhannon*, 532 U.S. at 604) (internal quotation marks omitted)).

¶12 Contrary to the appellant's argument, the Board's decision in *Mynard v. Office of Personnel Management*, 108 M.S.P.R. 58, ¶¶ 13-17 (2008), does not support his position. In *Mynard*, the Board found that a party may establish prevailing party status in a compliance action without obtaining an enforceable order or consent decree in the compliance proceeding "so long as the relief the party achieves carries with it sufficient judicial or, in this case, Board imprimatur." *Id.*, 108 M.S.P.R. 58, ¶¶ 14-15. The Board's oversight of the parties' compliance with a final Board order or an enforceable settlement agreement provides sufficient Board imprimatur to allow a party to qualify as a prevailing party under 5 U.S.C. § 7701(g)(1) in the compliance matter. *Id.*, ¶ 17. However, neither the Board nor its reviewing court has held that a party may use a favorable order in a separate case to establish prevailing party status in a case that has been dismissed as moot. *See also Klamath Siskiyou Wildlands Center v. United States Bureau of Land Management*, 589 F.3d 1027, 1033-35 (9th Cir. 2009) (finding that the plaintiff was not a prevailing party in a case dismissed as moot where the agency had involuntarily rescinded its action as a result of an unfavorable court decision in a separate case involving the same parties and the same type of agency action).

¶13 Accordingly, the appellant is not a prevailing party in this appeal and he is not entitled to an award of attorney fees. In light of our disposition in this case,

we need not address whether an award of fees is precluded by the earlier settlement agreement, and we need not discuss the parties' remaining arguments concerning the merits of the attorney fees request.

ORDER

¶14 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.