UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 14

Docket No. SF-0846-10-0976-I-2

Robert Regdon,

Appellant,

v.

Department of the Army,

Agency.

February 8, 2012

Robert Regdon, Santa Cruz, California, pro se.

David Starratt, Fort Sam Houston, Texas, 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 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant was appointed to a Nonappropriated Funds Instrumentality (NAFI) position with the agency on October 1, 1973, and enrolled in a NAFI retirement plan on October 10, 1974. MSPB Docket No. SF-0846-10-0976-I-1,

Initial Appeal File (IAF-1), Tab 5, Exhibits 1, 2. On October 12, 1992, he resigned from his position to accept an appropriated fund appointment, which was effective October 13, 1992, and covered by the Federal Employees' Retirement System (FERS). *Id.*, Exhibits 3-5. He transferred to the U.S. Coast Guard on July 10, 2005, and resigned effective August 20, 2009. *Id.*, Exhibits 6-7. Thereafter, the appellant applied for retirement through the Army NAF Employee Benefits Program. IAF-1, Tab 1 at 29. On August 6, 2010, Patty Simpson, the Benefits Operations Manager, informed him that his only option for combining his NAFI and FERS retirement credits was to transfer the NAFI funds to FERS, contrary to the appellant's stated desire to retain Army NAFI retirement. *Id.* She also informed him that he was required to make the election to combine his retirement plans into FERS that same day. *Id.*

¶3 The appellant filed an initial appeal with the Board alleging that the agency issued a final decision affecting his retirement rights. IAF-1, Tab 1 at 15-27. He alleged that the agency violated the provisions of 5 C.F.R. part 847 when it informed him that he was not eligible to transfer his FERS contributions to the NAFI retirement plan. *Id.* at 20-21, 24, 27. The agency argued that the e-mail from Ms. Simpson did not constitute a final agency decision and that the Board lacked jurisdiction because the appellant's claim involved his NAFI retirement, not his rights or interests under FERS. IAF-1, Tab 5 at 4-5. During the pendency of the appeal, the agency rescinded the e-mail from Ms. Simpson, informed the appellant that it had not made a determination that his only option to obtain combined retirement credit was to transfer his NAFI contributions to FERS or that he was ineligible to transfer his FERS contributions to the NAFI retirement plan, and informed him of his options under NAFI retirement and FERS. MSPB Docket No. SF-0846-10-0976-I-2, Initial Appeal File (IAF-2), Tab 7 at 1-5.[1]

---

[1] The appellant requested a continuance, and the administrative judge dismissed the appeal without prejudice to re-filing. IAF-1, Tabs 7, 10, 12.

¶4 The administrative judge dismissed the appeal for lack of jurisdiction without a hearing. IAF-2, Initial Decision (ID) at 1. He found that Ms. Simpson's e-mail did not constitute a final decision affecting the appellant's rights or interests under FERS because the appellant failed to show that he ever made an election that the agency thereafter denied. ID at 5. He further found that, even if the e-mail were a final decision over which the Board exercised jurisdiction, the Board no longer had jurisdiction over it because the agency completely rescinded it. *Id.*

¶5 The appellant has filed a petition for review challenging several portions of the initial decision. Petition for Review (PFR) File, Tab 1. He disagrees with the administrative judge's finding that the e-mail was not a final agency decision and argues that it was a final decision in every way except that it failed to inform him of the right to appeal to the Board. *Id.* at 5. He argues that, even though the administrative judge correctly determined that he did not make an election, the issue here is that he was deprived of one of his election options under 5 C.F.R. part 847. Finally, he states that, despite the rescission of the e-mail, his rights and interests under FERS "were delayed and remain affected." *Id.* at 7. The agency has filed an opposition arguing that: it never made a "final decision," the e-mail did not affect the appellant's rights or interests under FERS, the agency rescinded the e-mail, and the issue is moot. PFR File, Tab 3.

ANALYSIS

¶6 5 C.F.R. part 847 governs elections of retirement coverage by current and former employees of NAFIs. The provisions detail the transfer of contributions between the NAFI retirement system and FERS, including conditions under which an employee may make a retroactive election. 5 C.F.R. §§ 847.201-847.443. Several provisions of 5 C.F.R. part 847 relate to the election rights of an individual who made a qualifying move from NAFI to FERS between January 1, 1987, and August 9, 1996, which is the time period within which the appellant

transferred from a NAFI position to a position covered by FERS. IAF-1, Tab 5, Exhibit 5 (the appellant transferred to a position covered by FERS on October 13, 1992); 5 C.F.R. §§ 847.202(f), 847.402(b). These provisions allow certain qualifying employees who transfer from NAFI positions to FERS positions to transfer their FERS contributions to their NAFI retirement. 5 C.F.R. §§ 847.202(f), 847.205, 847.210, 847.402(b), 847.441, 847.503-847.506.[2] Under 5 C.F.R. § 847.105, the agency is responsible for notifying its employees of the opportunity to make an election under subparts B (elections to continue retirement coverage after a qualifying move) and D (elections of coverage under the retroactive provisions) of part 847 and for determining whether employees are qualified to make an election. The time limits for making an election under subparts B and D may be waived under certain circumstances, including a lack of notice or counseling. 5 C.F.R. §§ 847.206(b), 847.302, 847.304(b).[3] If the agency determines that an employee is not eligible to make an election, the agency is required to issue a final decision that includes notice of the right to appeal to the Board. 5 C.F.R. §§ 847.105(b), 847.106, 847.107; *see Markanich v. Office of Personnel Management*, 104 M.S.P.R. 323, ¶ 11 (2006).

¶7 Ms. Simpson's e-mail to the appellant specifically informed him that the Chief of the Army NAF Employee Benefits Program, Ron Courtney, decided that the appellant was not eligible to combine his FERS and NAFI retirement contributions by transferring his FERS contribution to the NAFI retirement plan. IAF-1, Tab 1 at 29 ("I'm sorry that your desire to retain Army NAF retirement at

---

[2] The appellant alleged that he satisfied the requirements for eligibility to make an election to remain in the NAFI retirement plan. IAF-1, Tab 1 at 25.

[3] The appellant alleged that he was not given notice of his election rights and that he has been attempting to resolve this issue to no avail. IAF-1, Tab 1 at 21 ("[A]t every job, location, and stage of my career, I asked for assistance and resolution of remaining portability and retirement issues. Some were fixed or partially corrected, but others including retirement, remained unresolved."), 25, 27.

this late date is no longer an option according to the Chief of Army NAF Benefits.") (emphasis omitted). Ms. Simpson stated that the only option available to him to combine his retirement service was to transfer his NAF contributions to FERS because "too much time had passed" and the agency could not obtain the required contributions from the other employing agencies. *Id.* Furthermore, Ms. Simpson stated, "If you want combined retirement credit, you must sign and date this form and return it today." *Id.* (emphasis omitted).

¶8 We find that the e-mail from Ms. Simpson constituted a final agency decision under 5 C.F.R. part 847. First, the agency clearly denied the appellant the opportunity to make an election to transfer his FERS retirement contributions to his NAFI retirement plan, which is an option available to certain employees under both subparts B and D. *See* 5 C.F.R. §§ 847.205, 847.210, 847.441, 847.503-847.506. Additionally, the e-mail stated that the decision was made by the Chief of the Army NAF Benefits Program and, given that the appellant was only given one choice to combine retirement plans, which he had to elect immediately, it is clear that this decision was final. *See* 5 C.F.R. §§ 847.105, 847.106(a). Thus, the appellant established that he had the right to appeal to the Board from a final agency decision.[4] *See* 5 C.F.R. § 847.107.

---

[4] The agency argued below and argues on review that the appellant has no right to appeal to the Board because, to the extent that it made a final decision, such a decision did not affect the appellant's rights or interests under FERS because the decision concerned his NAFI retirement. IAF-1, Tab 5 at 6; PFR File, Tab 3 at 5; 5 C.F.R. § 847.107(a). The administrative judge did not address the agency's argument, and we find it unpersuasive. The purpose of 5 C.F.R. part 847 is to address retirement coverage for current or former employees of NAFI, including the options to transfer between NAFI and FERS (or the Civil Service Retirement System), and it is logical to conclude that the decision to disallow a transfer of retirement benefits from one system to the other affects the appellant's rights under both retirement systems. Further, the provisions under which the appellant would be entitled to elect NAFI retirement undoubtedly affect his rights or interests under FERS with respect to various matters, including credit for refunded FERS service and exclusion from future FERS coverage. 5 C.F.R. §§ 847.416, 847.443. The agency does not cite to any authority supporting its position, which is contradicted by the regulations giving individuals covered under part 847 the right to appeal to the Board. 5 C.F.R. § 847.107.

¶9 Nevertheless, we agree with the administrative judge's conclusion that the agency completely rescinded the action, which divests the Board of jurisdiction. ID at 5. Mr. Courtney rescinded the e-mail from Ms. Simpson by letter during the pendency of the appeal. IAF-2, Tab 7 at 1. In the letter, Mr. Courtney stated, "This office has not made a determination that your only option to obtain combined retirement credit is to transfer your non-appropriated fund (NAF) contribution to the Federal Employees Retirement System (FERS) or that you are ineligible to transfer your FERS contribution to the NAF retirement plan." *Id.* He further attached a worksheet comparing the options available to the appellant, including estimates of his benefits, and specified that "[t]hese estimates do not represent a final decision by the agency regarding your retirement benefits." *Id.* He concluded by inviting the appellant to contact him "[f]or additional information or to apply for NAF retirement benefits." *Id.* Mr. Courtney attached worksheets that detailed the appellant's retirement options, including his options for retiring under the NAFI retirement plan, and estimates and comparisons of the options. *Id.* at 2-5.

¶10 In analogous cases, the Board has found that a complete rescission of a final decision on retirement benefits divests the Board of jurisdiction. *See Castellano v. Office of Personnel Management*, 110 M.S.P.R. 167, ¶ 8 (2008); *Rorick v. Office of Personnel Management*, 109 M.S.P.R. 597, ¶ 5 (2008); *Richardson v. Office of Personnel Management*, 101 M.S.P.R. 128, ¶ 3 (2006). Here, the agency completely rescinded the final decision and made available to the appellant the options that it had previously determined were unavailable. Neither party argues on review that there is a new final decision, and the appellant does not argue that he has unsuccessfully attempted to exercise the options available to him. Thus, in the absence of a final decision, the Board lacks jurisdiction over the appeal. *See Castellano*, 110 M.S.P.R. 167, ¶ 8 & n.*.

¶11 The agency argues on review that, in light of the rescission, the issues in this appeal are moot. The agency has not submitted acceptable evidence that it

has afforded the appellant all relief to which he would be entitled if the appeal had been adjudicated and he had prevailed. *See Moore v. Office of Personnel Management*, 114 M.S.P.R. 549, ¶ 5 (2010). Thus, we dismiss the appeal for lack of jurisdiction without prejudice to the appellant's filing of an appeal from any future final decision of the agency concerning his NAFI retirement.[5] *See Rorick*, 109 M.S.P.R. 597, ¶¶ 6-7. Accordingly, after the agency issues a new final decision, the appellant may appeal to the appropriate Board regional office if he disagrees with the final decision. Any future appeal must be filed within the time limits set forth in the Board's regulations. *See* 5 C.F.R. § 1201.22.

ORDER

¶12 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

---

[5] The appellant argues that this appeal also concerns claims against the U.S. Coast Guard. In *Regdon v. Department of Homeland Security*, we dismissed the appellant's petition for enforcement as withdrawn and notified him that, should he have reason to believe that the agency violated the settlement agreement, he may file a petition for enforcement consistent with the Board's regulations. MSPB Docket No. SF-0752-09-0192-C-1, Final Order at 2 (May 6, 2011).

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:

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