UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 58

Docket No. DA-1221-10-0725-W-1

Joseph Vick,

Appellant,

v.

Department of Transportation,

Agency.

April 20, 2012

R. Bobby Devadoss, Esquire, Dallas, Texas, for the appellant.

Theresa Dunn, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the June 27, 2011 initial decision that dismissed his individual right of action (IRA) appeal as moot. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication.

BACKGROUND

¶2 The appellant, a Safety Inspector with the agency's Federal Aviation Administration, filed a timely IRA appeal in which he alleged that the agency had suspended him in retaliation for protected whistleblowing activities. Initial

Appeal File (IAF), Tab 1 at 1, 3, 5, 7, 14. He also requested an award of consequential damages. *Id.* at 9.

¶3 During the processing of the appeal, the agency submitted documentation indicating that it had initiated actions to cancel the appellant's suspension, to award him back pay and an annual pay increase that he missed due to the suspension, and to reimburse him for an unpaid travel voucher. IAF, Tab 27 at 1; IAF, Tab 26 at 4-8. The agency argued that the appeal was therefore moot and the administrative judge ordered the appellant to file evidence and argument on that issue. IAF, Tab 27 at 1-2. Both parties responded to the administrative judge's order. IAF, Tabs 28-29. Because she found that the only remaining issue was the appellant's outstanding claim for attorney fees, the administrative judge dismissed the appellant's IRA appeal as moot. IAF, Tab 30, Initial Decision (ID) at 4.

¶4 In his timely-filed petition for review, the appellant argues that the appeal is not moot because he has not been made whole. Petition for Review File (PFR File), Tab 1 at 6; ID at 4; 5 C.F.R. § 1201.114(d). He asserts that the agency has not yet paid his back pay or his attorney fees and has not completely rescinded his suspension. PFR File, Tab 1 at 7-8. The agency responds in opposition. PFR File, Tab 3.

ANALYSIS

¶5 As noted above, the appellant requested both consequential damages and attorney fees in his IRA appeal. The administrative judge did not address the appellant's consequential damages claim and she incorrectly found that an outstanding claim for attorney fees does not preclude the dismissal of this IRA appeal as moot. ID at 3 (citing *Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 198 (1996)). Although an outstanding claim for attorney fees does not preclude dismissing an appeal brought under chapter 75, like the one in *Currier*, as moot, the Board has held that a request for attorney fees in an IRA appeal is a claim for

corrective action. *Santos v. Department of Energy*, 99 M.S.P.R. 475, ¶ 7 (2005) (citing *Turner v. Department of Veterans Affairs*, 96 M.S.P.R. 476, ¶ 6 (2004)). Additionally, after providing sufficient notice, an administrative judge must afford an appellant a specific opportunity to raise a claim for consequential damages before dismissing an IRA appeal as moot. *Gilbert v. Department of the Interior*, 101 M.S.P.R. 238, ¶ 6 (2006); *Santos*, 99 M.S.P.R. 475, ¶ 7. Thus, even though the agency rescinded the personnel action at issue, the appellant's outstanding claims for consequential damages and corrective action preclude dismissing his IRA appeal as moot. *Santos*, 99 M.S.P.R. 475, ¶ 7 (citing *Walton v. Department of Agriculture*, 78 M.S.P.R. 401, 403-04 (1998)).

ORDER

¶6 Accordingly, we REMAND this appeal for adjudication of the appellant's whistleblowing claim. The administrative judge shall afford the appellant the opportunity to raise a claim of consequential damages. If the administrative judge finds that the Board has jurisdiction over the appellant's whistleblowing claim, and that the personnel actions he raised before the Office of Special Counsel were the result of whistleblowing reprisal, she shall also adjudicate the appellant's claim for corrective action, including reasonable attorney fees and costs, and any claim for consequential damages.

FOR THE BOARD:

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