UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 74

Docket No. DE-0752-11-0190-I-2

Kenneth R. Price,

Appellant,

v.

United States Postal Service,

Agency.

June 26, 2012

Marisa L. Williams, Esquire, Englewood, Colorado, for the appellant.

Kimberly Cates Wiseman, Esquire, Denver, Colorado, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision dismissing his demotion appeal as moot. For the reasons set forth below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On November 22, 2010, the agency proposed the appellant's removal from his position as a Postmaster, EAS-22, at the agency's Englewood Post Office in Englewood, Colorado based on one charge of unacceptable conduct with three

specifications alleging conduct by the appellant that violated the agency's policies on sexual harassment. Initial Appeal File (IAF), Tab 7 at 19, 25-34. On January 14, 2011, the deciding official sustained each specification, and thus the charge, and determined that discipline was warranted. *Id.* at 20. However, after reviewing the *Douglas* factors, the deciding official reduced the penalty from removal to a demotion from Postmaster, EAS-22, to Postmaster, EAS-13, at Dupont, Colorado, effective January 15, 2011. *Id.* at 18, 20. The appellant filed a timely appeal of his demotion with the Board and later alleged that the agency discriminated against him on the bases of his race and sex. IAF, Tab 1; Refiled Appeal File (RAF), Tab 8 at 12.

¶3 On April 20, 2011, the agency notified the Board that it was rescinding the demotion and intended to provide the appellant status quo ante relief. *See* IAF, Tab 23. On April 21, 2011, the administrative judge dismissed the appeal without prejudice in order to allow the agency an opportunity to provide the appellant status quo ante relief. *Id.* The appeal was automatically refiled on May 27, 2011. RAF, Tab 2. In June 2011 and again in September 2011, the administrative judge ordered the parties to submit evidence and argument as to whether the appeal was moot. *Id.*, Tabs 6, 13. Both parties responded to each order. *Id.*, Tabs 8-12, 14, 17.

¶4 The administrative judge dismissed the appeal as moot without holding a hearing. RAF, Tab 18, Initial Decision at 1, 22. He found that the agency submitted a PS 50 evidencing the appellant's assignment to the position of Englewood Postmaster, EAS-22, effective January 15, 2011, and a PS 50 evidencing the appellant's upgrade from EAS-22 to EAS-24, effective March 26, 2011. *Id.* at 6. The administrative judge also found that the agency submitted payroll journals evidencing payment of back pay to the appellant and that the appellant did not dispute the agency's contention that he had been reinstated and received appropriate base back pay. *Id.* The administrative judge rejected the appellant's claim that the agency did not truly rescind the action because it

subsequently issued him a letter of warning based on the same misconduct, finding that the agency was permitted to take a new disciplinary action based on the same underlying incidents. *Id.* at 6-8. The administrative judge found that the agency proved by preponderant evidence that all references to the demotion have been removed from the appellant's electronic official personnel file (OPF) and that the agency was not required to purge all documents in the labor relations file evidencing the appellant's demotion in order to cancel the demotion. *Id.* at 8-10. The administrative judge further found that the appellant's request for disciplinary action against certain agency officials did not prevent the appeal from being moot, that the agency paid the appellant interest on his back pay, that the agency demonstrated that it complied with applicable regulations pertaining to the appellant's Thrift Savings Plan (TSP) account, that the agency need not recredit any of the appellant's leave, and that the appellant is not entitled to recover out-of-pocket expenses. *Id.* at 11-15.

¶5 The administrative judge rejected the appellant's claims of discrimination on the bases of his sex and race under the theory of disparate treatment, finding that the appellant failed to present any direct evidence of disparate treatment based on his sex or race, that he failed to present evidence that he was similarly situated to those not of his groups or that he was treated more harshly than another individual, and that he therefore failed to establish a genuine issue of fact regarding his prima facie case of disparate treatment discrimination. *Id.* at 16-18. The administrative judge further found that, even if the appellant had established a prima facie case of discrimination, the agency articulated a legitimate, nondiscriminatory reason for its action and the appellant failed to demonstrate a genuine issue of fact regarding whether the stated reason was merely a pretext for discrimination. *Id.* at 19-21. The administrative judge thus found that the agency provided all the relief the Board could have required had it adjudicated the matter and ordered the appellant's demotion cancelled and that the appeal must be dismissed as moot. *Id.* at 21-22.

¶6 The appellant has filed a petition for review.[1] Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition. *Id.*, Tab 3.

ANALYSIS

¶7 In his petition for review, the appellant asserts that the administrative judge should have held a hearing or ordered the agency to completely rescind the action rather than allowing the agency to repeatedly delay the appeal. PFR File, Tab 1 at 12-13. The appellant asserts that in allowing the agency to perpetuate the delay the appellant was forced to "run up" his legal fees and identify the steps required of the agency to rescind the disciplinary action. *Id.* The appellant further asserts in his petition for review that the administrative judge improperly placed the burden on him to prove rescission of the action by ordering him to provide evidence that his case was not moot. *Id.* at 13.

¶8 Even though an action may be within the Board's jurisdiction, subsequent events may render an appeal moot and foreclose the Board's review. *Rodriguez v. Department of Homeland Security*, 112 M.S.P.R. 446, ¶ 12 (2009). Mootness can arise at any stage of litigation, and an appeal will be dismissed as moot when, by virtue of an intervening event, the Board cannot grant any effectual relief in favor of the appellant, as when the appellant, by whatever means, obtained all of the relief he could have obtained had he prevailed before the Board and thereby lost any legally cognizable interest in the outcome of the appeal. *Id.* The agency's unilateral modification of its personnel action after an appeal has been filed cannot divest the Board of jurisdiction, unless the appellant consents to such divestiture or the agency completely rescinds the action being appealed. *Id.* For an appeal to be deemed moot, the agency's rescission must be complete, i.e., the appellant must be returned to the status quo ante and not left in a worse position

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[1] The appellant does not reassert his discrimination claims in his petition for review and does not dispute the administrative judge's findings on those claims. We discern no reason to disturb the administrative judge's findings with respect to this issue.

as a result of the cancellation than he would have been in if the matter had been adjudicated and he had prevailed. *Id.* If an appeal is not truly moot despite cancellation of the action under appeal, the proper remedy is for the Board to retain jurisdiction and to adjudicate the appeal on the merits. *Fernandez v. Department of Justice*, 105 M.S.P.R. 443, ¶ 5 (2007).[2]

¶9 The appellant's assertions regarding the administrative judge's placement of the burden among the parties are without merit. The administrative judge set forth the appropriate standard regarding dismissal of an appeal as moot based on an agency's rescission of an appealable action in the April 21, 2011 decision dismissing the appeal without prejudice when the agency first provided notice that it intended to rescind the action. *See* IAF, Tab 23 at 2. Following the sua sponte refiling of the appeal by the Board, the agency submitted evidence on June 2 and June 8, 2011, that the appellant was placed back into his former position, as well as upgraded to a level EAS-24, and that the agency had processed the appellant's back pay. RAF, Tabs 3, 5. In a June 10, 2011 order, the administrative judge acknowledged the evidence submitted by the agency and ordered the appellant to submit evidence and argument that the agency had in fact failed to provide him status quo ante relief. *Id.*, Tab 6. In response, the appellant asserted, inter alia, that his OPF still reflected that he was disciplined, that the agency failed to pay him interest on his back pay award, that the agency failed to pay him interest or lost income on his TSP contributions, and that the agency failed to properly credit his leave accounts. *Id.*, Tab 8 at 8-11. In reply, the agency submitted evidence and argument that, inter alia, it had purged any reference to discipline in the appellant's file, it had recently calculated and paid the appellant interest on his back pay award, and it was not required to recredit

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[2] The incurrence of costs and attorney fees will not prevent dismissal of an appeal as moot because an attorney fee award under 5 U.S.C. § 7701(g) is considered to be separate from relief on the merits. *See Murphy v. Department of Justice*, 107 M.S.P.R. 154, ¶ 6 (2007).

any leave to the appellant or pay interest on TSP contributions. *Id.*, Tab 9 at 5-7, 14-20. In a September 15, 2011 order, the administrative judge ordered the agency to submit evidence that it complied with the Federal Retirement Thrift Investment Board (FRTIB) regulations regarding the appellant's TSP account, and in response the agency submitted evidence and argument indicating that it provided the appellant with status quo ante relief with respect to his TSP contributions as well as interest and lost earnings on those contributions. *Id.*, Tabs 13-14.

¶10 While there was a fair amount of back and forth between the appellant and the agency after the appeal was refiled sua sponte regarding status quo ante relief, we discern no error by the administrative judge in assigning the burden of proof with respect to the issue of the mootness of the appeal. Essentially, the agency initially brought forth evidence and argument that it provided the appellant with status quo ante relief, and the appellant disagreed with respect to several specific items, leading the agency to submit additional evidence and argument addressing those assertions. We find no merit in the appellant's assertion that the administrative judge somehow allowed the agency to avoid its burden of proof. Further, there is no evidence to suggest that the agency unreasonably or purposefully delayed the processing of the appeal or the complete rescission of the demotion action as the appeal was refiled sua sponte on May 27, 2011, and the initial decision finding the appeal moot was issued on September 30, 2011.

¶11 The appellant also asserts in his petition for review that the agency failed to meet its burden in proving that it rescinded the demotion and in proving that the appeal is moot because the agency has not purged its files of all references to the demotion action, has not paid him interest on his TSP contributions, and has not properly recredited his leave accounts. PFR File, Tab 1 at 15-18. We address each of these assertions below.

¶12 First, the appellant reaffirms in a declaration that as of November 4, 2011, his agency personnel management records still reflect that the agency placed him

on a lengthy period of administrative leave and in leave without pay status, neither of which would have occurred but for the demotion action. *Id.* 20-21; *see id.* at 15. He further asserts that "any [agency] manager can access his electronic records and deduce from these two annotations that he was indeed subjected to discipline." *Id.* at 15.

¶13 When the Board orders cancellation of an action, it requires that the agency remove all references to that action from the employee's personnel record. To render an appeal moot by canceling an appealable action, an agency must do no less. *Rodriguez*, 112 M.S.P.R. 446, ¶ 14. The administrative judge found that the agency established by preponderant evidence that all references to the demotion have been removed from the appellant's OPF. Initial Decision at 9. The appellant does not dispute that finding in his petition for review; rather, he asserts that his personnel records still reflect that the agency placed him on administrative leave and on leave without pay, which occurred only as a result of the disciplinary action.[3] PFR File, Tab 1 at 15.

¶14 While the appellant relies on *Marren v. Department of Justice*, 55 M.S.P.R. 1 (1992), and *Massie v. Department of Transportation*, 114 M.S.P.R. 155 (2010), to support his contention, these cases are distinguishable from the instant appeal. In *Marren*, the Board found that the appellant made a nonfrivolous allegation that an absence without leave (AWOL) charge had not been rescinded based on his assertions that the agency reported his AWOL in various agency memoranda and reports and submitted those documents in other actions taken against him. *Marren*, 55 M.S.P.R. at 3. There is no indication here that any reference to the demotion action remains in the appellant's personnel record. Further, as the administrative judge acknowledged, *Massie* involved a settlement agreement requiring the agency to "expunge" an admonishment, while

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[3] The appellant does not explain exactly when he was placed on administrative leave or in a leave without pay status in connection with the demotion action.

no such settlement is at issue here. *Massie*, 114 M.S.P.R. 155, ¶ 4; Initial Decision at 10. The appellant fails to cite to any Board law requiring an agency to remove from personnel records all references to administrative leave that may have been related to a disciplinary action or suggesting that references to administrative leave or leave without pay in personnel records are necessarily indicative of discipline. Accordingly, we find no reason to disturb the administrative judge's finding that all references to the demotion action were removed from the appellant's personnel records. *See* Initial Decision at 9.

¶15 The appellant claims, with respect to the interest paid on his TSP account, that, while the agency corrected the initial contribution to his TSP account for the period of his demotion, it has not paid him for the lost interest on those contributions. PFR File, Tab 1 at 16. He asserts that *Tubesing v. Department of Health & Human Services*, 115 M.S.P.R. 327 (2010), requires the agency to request a computation of interest from the FRTIB but that the declaration from Russell Teed, Accounting and Control Specialist for the Payroll Benefits Branch, did not aver that he asked FRTIB to calculate interest, and thus the agency failed to prove that it provided him with status quo ante relief with respect to his TSP account. PFR File, Tab 1 at 16-17.

¶16 The regulations implementing the Back Pay Act require an agency to correct errors affecting an employee's TSP account consistent with regulations prescribed by the FRTIB.[4] 5 C.F.R. § 550.805(h); *see Tubesing*, 115 M.S.P.R. 327, ¶ 17; *Madison v. Department of Defense*, 111 M.S.P.R. 614, ¶ 11 (2009), *aff'd*, 363 F. App'x 26 (Fed. Cir. 2010). The FRTIB regulations address the process by which a reinstated employee's TSP account should be credited with the contributions that should have been made during the back pay period.

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[4] Because the appellant is a preference eligible employee, his entitlement to back pay is governed by the Back Pay Act and 5 C.F.R. § 550.805 rather than Employee and Labor Relations Manual § 436. *Andress v. U.S. Postal Service*, 56 M.S.P.R. 501, 507-08 (1993).

Tubesing, 115 M.S.P.R. 327, ¶ 17 (citing 5 C.F.R. § 1605.13). Among other things, the regulations require the employing agency to deduct the appropriate TSP contributions from an employee's back pay award and submit the contributions to the "TSP record keeper," a component of the FRTIB. *Tubesing*, 115 M.S.P.R. 327, ¶ 17 (citing 5 C.F.R. § 1605.13(c)(1)). The agency must show that it has complied with the FRTIB's regulations regarding back pay awards, including the requirement that the agency inform the TSP record keeper of the back pay award. *Tubesing*, 115 M.S.P.R. 614, ¶ 20. The agency must also show that it requested the FRTIB to provide a computation of interest and lost earnings in accordance with the applicable regulations. *Id.*

¶17 The appellant concedes in his petition for review that the agency corrected the initial contribution amount to his TSP for the period of his demotion, but he asserts that the agency has not paid him for the lost interest on those contributions. PFR File, Tab 1 at 16. As the administrative judge recognized, Mr. Teed explained in his sworn declaration that the TSP calculated the appellant's interest and lost earnings, known as "breakage," based on the "late" TSP contributions resulting from the appellant's back pay award. Initial Decision at 13-14; RAF, Tab 14 at 7-9. Mr. Teed noted that the TSP, rather than the agency, calculates breakage and that breakage can be positive or negative given the risk of investments. RAF, Tab 14 at 8. Mr. Teed attached a computer report and explained that the report is customized to show "any and all periods of employment history TSP deductions" and "the exact breakage calculated by TSP with respect to these periods of back pay for [the appellant]." *Id.* Mr. Teed explained the breakage calculations for relevant pay dates in relevant funds for employee contributions, agency automatic contributions, and agency matching contributions. *Id.* at 8-9, 20-25. Such calculations represent the computation of interest and lost earnings in accordance with *Tubesing* and the applicable regulations. *See id.* at 20-25. The appellant's assertion that the agency failed to meet its burden solely because Mr. Teed did not explicitly aver to requesting the

FRTIB to calculate interest and lost earnings is without merit as the evidence shows that breakage was calculated and credited to the appellant's TSP account.

¶18 On review, the appellant renews his claim that the agency failed to pay or credit his leave accounts for 16 hours of sick leave and 117 hours of annual leave he used as a direct result of the disciplinary action. PFR File, Tab 1 at 17. He asserts that he is entitled to "receive payment or re-crediting to his leave accounts as part of the rescission of the discipline." *Id.* The appellant asserts that the administrative judge misunderstood his argument on this issue and that, as a EAS-22 Postmaster, he "could have taken these hours off work without using either sick or annual leave because he had the discretion to combine his work hours with 'personal leave,'" a benefit not available to him when he was demoted to an EAS-13 position. *Id.* at 18. He claims that, because he lost the right to use his personal leave at his discretion when he was demoted to the EAS-13 position, the demotion cost him 16 hours of sick leave and 117 hours of annual leave for which he should be paid or recredited. *Id.*

¶19 As the appellant pointed out, it appears that his EAS-22 Postmaster position is Fair Labor Standards Act (FLSA)-exempt, but the EAS-13 Postmaster position to which he was demoted was FLSA-nonexempt. IAF, Tab 7 at 18-19. According to the agency's Employee and Labor Relations Manual (ELM) and Administrative Support Manual (ASM), FLSA-exempt employees are governed by different leave rules than are FLSA-nonexempt employees. ELM § 519.7; ASM § 313. Specifically, FLSA-exempt employees generally have the option of taking absences of less than half a day as "personal absence time," which is not charged to annual leave, sick leave, or leave without pay. ELM §§ 519.72-.73; ASM § 313. Consequently, it is likely that, although the record has not been fully developed on this matter, at least some of the 133 hours of sick and annual leave that the appellant allegedly took while he was in an EAS-13 position could have been taken as personal absence time if he had still been in an EAS-22 position.

¶20 The Board's remedial powers under the Back Pay Act extend not only to the restoration of or reimbursement for leave that has not been accrued; they also extend to the restoration of or reimbursement for leave that an appellant was improperly required to take. *See, e.g.*, *Office of Special Counsel v. Department of Veterans Affairs*, 81 M.S.P.R. 601, ¶ 10 (1999); *Tyrrell v. Department of Veterans Affairs*, 60 M.S.P.R. 276, 278-79 (1994). The instant appeal is identical in all material aspects to *Galatis v. U.S. Postal Service*, 110 M.S.P.R. 399, ¶ 7 (2009), in which the Board found that the appellant's demotion to a craft position entailed the use of leave that he would not otherwise have had to use since his former position was covered under ELM § 519.72. In that case, the Board found that the appellant was entitled to restoration of that leave pursuant to a settlement agreement providing that the appellant would be afforded back pay from the date of his demotion. *Id.*, ¶¶ 2, 7. Accordingly, because the agency has likely not afforded the appellant all the relief to which he would be entitled if he prevailed on the merits, the administrative judge should not have dismissed the appeal as moot. *See Bullock v. Department of the Air Force*, 80 M.S.P.R. 361, ¶ 6 (1998).

ORDER

¶21 We therefore REMAND the appeal to the regional office for further proceedings consistent with this Opinion and Order regarding the appellant's contention that the agency has not properly recredited the leave that he took while he was in an EAS-13 position, which potentially could have been taken as personal absence time if he had still been in an EAS-22 position.

FOR THE BOARD:

Washington, D.C.

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William D. Spencer
Clerk of the Board