UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN DANBURY, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER PH-0752-10-0328-A-1 DATE: October 3, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Steven Newman, Esquire, New York, New York, for the appellant.

Wendy I. Provoda, Esquire, Windsor, Connecticut, for the agency.

BEFORE

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

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

In the petition for review, the appellant challenges the initial decision denying his motion for attorney fees. The appellant argues that a March 2, 2011 "Notice and Order" issued by the administrative judge constituted an enforceable judgment on the merits that materially altered the parties' legal relationship, awarded him some relief, and was a substantive determination that resulted in him receiving monies. The appellant asserts that a prevailing party is determined by looking at the case as a whole, rather than solely at the final decision.

The administrative judge thoroughly addressed these issues in the initial decision, and we discern no reason to disturb those well-reasoned findings. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (stating that there is no reason to disturb the initial decision when the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same). Whether a party may be deemed a prevailing party depends on the relief ordered in the Board's final decision. *Driscoll v. U.S. Postal Service*, 116 M.S.P.R. 662, ¶ 9 (2011); *Baldwin v. Department of Veterans Affairs*, 115 M.S.P.R. 413, ¶ 11 (2010) ("The determination of an award of attorney fees is based upon the final decision of the Board and whether, by the final decision, the appellant is a prevailing party."). Preliminary conclusions, such as those set forth in an administrative judge's Order and Summary, neither establish judicial imprimatur nor constitute a court-ordered change in the legal relationship of the parties to permit an award. *Sacco v. Department of Justice*, 317 F.3d 1384, 1386 (Fed. Cir. 2003).

Contrary to the appellant's contention, there is no final decision of the Board on the merits that awards him any relief and materially changes the legal relationship of the parties. Rather, the initial decision, which became the Board's

final decision when neither party petitioned for review, merely dismissed the appeal as moot. *See Sanchez v. Department of Homeland Security*, 116 M.S.P.R. 183, ¶ 7 (2010) (an appellant whose removal appeal is dismissed as moot is not a "prevailing party" eligible for an award of attorney fees). The appellant has not identified any Board or court precedent that entitles him to prevailing party status under the facts of this case. To the extent that the appellant is relying upon a "catalyst" theory of establishing that he is a prevailing party, because his appeal resulted in him receiving monies representing 26 days in question, the Board and its reviewing court have rejected that theory. *See Sacco*, 371 F.3d at 1386-87; *Sacco v. Department of Justice*, 90 M.S.P.R. 37, ¶¶ 9-11 (2001).

Although the appellant, citing *Driscoll*, contends that a prevailing party is determined by looking at the case as a whole, rather than solely at the final decision, the Board held in *Driscoll*, 116 M.S.P.R. 662, ¶ 9, that an appellant is, or is not, a prevailing party in the case "as a whole" in order to explain that there can be, by definition, only one prevailing party, regardless of whether an appellant wins on one motion or phase of an appeal while the agency wins on another. The Board held that, contrary to the implication in some prior decisions, the Board does not determine prevailing party status on a "line-item basis," such as determining whether an appellant is a prevailing party with respect to an initial decision but not with respect to a cross-petition for review. *Id.* The Board did not suggest in *Driscoll* that a preliminary conclusion by an administrative judge establishes judicial imprimatur and constitutes a Board-ordered enforceable change in the legal relationship of the parties.

The appellant contends that an "order" is, by definition, enforceable. A party may, however, only petition the Board for enforcement of "a final decision or order" issued under the Board's appellate jurisdiction. 5 C.F.R. § 1201.182(a). The March 2, 2011 "Notice and Order," issued before the initial decision dismissing this appeal as moot, was not an enforceable "final decision or order."

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

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.