

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE**

KIMBERLY A. GRAVES,
Appellant,

DOCKET NUMBER
CH-0707-16-0112-J-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: December 3, 2015

James P. Garay Heelan, Washington, D.C., for the appellant.

Julia H. Perkins, Esquire, Washington, D.C., for the appellant.

Kristi Glavich, Detroit, Michigan, for the agency.

Marcus S. Graham, Esquire, Pittsburgh, Pennsylvania, for the agency.

Thomas Herpin, Esquire, Houston, Texas, for the agency.

BEFORE

Michele Szary Schroeder
Chief Administrative Judge

FINAL DECISION

On November 27, 2015, appellant, a former career, non-probationary Senior Executive Service (SES) Director of the St. Paul Veterans Affairs Regional Office (VARO) timely filed an appeal from her November 20, 2015 removal from the SES and transfer to the General Schedule 15, step 1 position of Regional Office Assistant Director, Phoenix VARO, based upon alleged misconduct. Appeal File (AF), Tab 1. Appellant's annual salary was decreased from \$176,558 to \$122,932. AF, Tab 37, page 7 of 14.

The Board has jurisdiction under 38 U.S.C. § 713(d)(2)(A),(g)(1)(A) and 5 U.S.C. § 7701. *See* 5 C.F.R. §§ 1210.1, 1210.2(a). This appeal received expedited review as required by 38 U.S.C. § 713(e), which meant, among other things, that the appeal could not be suspended, dismissed without prejudice, or stayed, and the undersigned was required to issue a decision within 21 days after the appeal was filed. 38 U.S.C. § 713(e)(3-4); 5 C.F.R. §§ 1210.1(c), 1210.3(a)(3-4). For the following reasons, the appeal is dismissed as moot.

MOOTNESS

Even though an action may be within the Board's jurisdiction, subsequent events may render an appeal moot and foreclose the Board's review. 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 she could have obtained had she prevailed before the Board and thereby lost any legally cognizable interest in the outcome of the appeal. *Price v. U.S. Postal Service*, 118 M.S.P.R. 222, ¶ 8 (2012).

However, 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. 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 as a result of the cancellation than she would have been in if the matter had been adjudicated and she had prevailed. *Id.*

On November 30, 2015, the agency filed a motion to dismiss the appeal as moot and to stay case-related deadlines, and attached exhibits showing that the deciding official had rescinded his Notice of Pending Action and Decision Letter, and personnel action forms reflected the retroactive cancellation of the action

taken against appellant. AF, Tab 30. The agency filed supplemental documentation relating to the motion to dismiss on December 2, 2015. AF, Tab 37.

On December 1, 2015, I had a teleconference with the parties to discuss the agency's motion to dismiss. Ultimately, based upon agency affidavits, evidence, and the representations of agency counsel, appellant consented to the dismissal of the appeal as moot.¹ AF, Tab 38. Accordingly, the agency's motion to dismiss is granted and the appeal is dismissed as moot.

DECISION

The appeal is **DISMISSED** as **MOOT**.

Michele Szary Schroeder
Chief Administrative Judge

NOTICE TO APPELLANT

Pursuant to 38 U.S.C. § 713(e)(2), this decision is final and not subject to any further appeal.

¹ I note that appellant has not raised defenses of discrimination or whistleblowing reprisal, which, because of the possibility of monetary damages, could preclude a mootness dismissal.