



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 1, 2017

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: John W. Morrison

Respondent: Department of the Navy

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2016-2542](#)

MSPB Docket No. PH-0752-14-0669-B-1

Issuance Date: November 29, 2017

The agency proposed to remove the appellant, and the deciding official drafted and signed a decision letter imposing his removal effective July 13, 2012. After becoming aware that he would be removed and believing that his removal would jeopardize his retirement benefits, the appellant retired effective July 13, 2012.

The appellant filed an involuntary retirement appeal with the Board. The administrative judge dismissed the appeal for lack of jurisdiction and, upon the appellant's petition for review, the Board remanded the appeal for a jurisdictional hearing to determine if his retirement was involuntary because he materially relied on agency misinformation regarding the effect of a removal action on his retirement benefits. *Morrison v. Department of the Navy*, 122 M.S.P.R. 205, ¶¶ 8-13 (2015). After holding a hearing, the administrative judge found that the

appellant's retirement was involuntary because he had not made an informed choice to retire in light of the fact that the agency failed to correct his misunderstanding that he would lose his retirement benefits if he was removed. The administrative judge ordered the agency to restore the appellant to the status quo ante by cancelling his retirement and retroactively returning him to his position effective July 13, 2012, and paying the appropriate amount of back pay.

The agency petitioned the Board for review of the initial decision. The Board affirmed the initial decision, except as modified to clarify how the facts of the case may affect the status quo ante relief. Specifically, the Board found that status quo ante relief required the agency to first determine if and when the appellant would have been removed had he not retired, and then to take the necessary unexecuted steps to issue its decision.

The appellant appealed the Board's decision to the Federal Circuit.

Holding: The Federal Circuit lacks jurisdiction to review the Board's opinion because it was not a "final order" or "final decision" of the Board.

- (1) The Federal Circuit has jurisdiction to review "a final order or final decision" of the Board. 28 U.S.C. § 1295(a)(9); see 5 U.S.C. § 7703(b)(1)(A) (stating that "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit"). As a general rule, an order is final only when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Therefore, an order remanding a matter to an administrative agency for further findings and proceedings is not final.
- (2) Although the Board concluded that the appellant's retirement was involuntary and that he should be returned to the status quo ante, the Board did not dispose of the entire action. Rather, the Board stated that, to ascertain the appropriate relief, "the agency [must] first determine if and when the appellant would have been removed had he not retired." The Board then outlined various potential outcomes, depending on how the agency decided that question.
- (3) Because the Board's ruling requires the agency to do more than just "execute the judgment," it was not a final order or decision for purposes of 28 U.S.C. § 1295(a)(9), and the court lacks jurisdiction to review the appellant's petition.

NONPRECEDENTIAL:

Coulibaly v. Merit Systems Protection Board, No. 14-1255 (consolidated with 14-1256) (D.C. Cir. Nov. 21, 2017) (MSPB Docket Nos. DC-1221-13-0440-W-1; DC-1221-14-0721-W-1) (affirming the Board's final decisions dismissing the appellant's individual right of action appeals for lack of jurisdiction).

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