UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GORDON BOLTON, ET AL., Appellants, v. DEPARTMENT OF THE ARMY, Agency.	)	DOCKET NUMBER DA-0351-97-0450-I-1[1] DATE: AUG 12, 1998

Charles H. Allenberg, Esquire, Neil C. Bonney & Associates, P.C., Virginia Beach, Virginia, for the appellants.

Carlos O. Santiago, Captain, Fort Polk, Louisiana, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

These consolidated appeals are before the Board on the appellants' petition for review of the initial decision dismissing their appeals for lack of jurisdiction.

[1] This is the docket number assigned to the appeal of the named appellant. The names of the remaining 19 appellants whose cases are adjudicated herein, and their designated docket numbers, are set forth in the Appendix to this Opinion and Order.

For the reasons stated below, we DENY their petition but REOPEN the appeals on our own motion, VACATE the initial decision, and DISMISS the appeals as MOOT. *See* 5 C.F.R. §§ 1201.115, 1201.117.

BACKGROUND

The agency informed the appellants that their WG-10 Heavy Mobile Equipment Mechanic positions, most of which had been classified in the WG-5803 series, had been reclassified and that they would be changed to lower-graded positions, either as WG-5823-9 Automotive Workers or WG-5803-9 Heavy Mobile Equipment Repairers (or the related "Leader" job), within the Directorate of Logistics, effective May 11, 1997. The agency's notice also advised them that: (1) they were entitled to grade retention for a two-year period; (2) if they disagreed with the title, series, grade or pay category of their position, they were entitled to file a formal job grading appeal with the agency in accordance with agency appeal procedures; and (3) after receiving the agency decision, they could file an appeal with the Office of Personnel Management. Appeal File (AF), Tabs 1 and 9, Subtab 4d (1-44). (References to the record before the administrative judge are to the lead file, *Alleman v. Department of the Army*, MSPB Docket No. DA-0351-97-0449-I-1.)

The appellants filed timely appeals of the agency's action, contending that the agency had effected not a reclassification action, but a “constructive reduction in force,” (RIF) as to which it failed to establish a valid basis, did not follow procedures or notify them of their appeal rights, and retaliated against them for protected union activity. AF, Tab 1.

Following the development of the record, the administrative judge found that the appellants had not raised a nonfrivolous allegation of jurisdiction that would entitle them to a hearing on their claims. He dismissed their appeals after concluding that the matters at issue were, in fact, reclassification actions and that

many of the appellants had filed classification appeals resulting in the reversal of their downgrading and position change. Because the Board lacks authority over reclassification appeals, he found no basis on which to exercise jurisdiction under this view of the case. He also rejected the claims of Board jurisdiction over the appeals as constructive adverse actions, and, without deciding whether the agency had conducted a RIF, he concluded that any RIF action would not be the basis for Board jurisdiction because the appellants are covered by a collective bargaining agreement (CBA) that makes its grievance provisions the exclusive administrative procedure for resolving disputes with RIFs. Finally, the administrative judge rejected as a potential source of authority the Board's decision in *Carter v. Department of the Army*, 62 M.S.P.R. 393, 398-400 (1994), *aff'd*, 45 F.3d 444 (Fed. Cir. 1995) (Table). There the Board held that a RIF may be a personnel action within the meaning of 5 U.S.C. § 2302(a)(2)(A), so as to bring it within the coverage of the individual right of action (IRA) provision of the Whistleblower Protection Act, if it is done for reasons personal to that appellant. The administrative judge noted that the appellants did not claim that the agency's action was taken in retaliation for their protected whistleblower activity, or that they first sought corrective action through the Office of Special Counsel prior to filing an IRA appeal with the Board.

The appellants filed a petition for review of this decision, and the agency has responded in opposition. During the consideration of the petition, the Clerk issued an order to the parties that noted the similarity between the issues raised in this case and in a related case, *Alleman et al. v. Department of the Army*, where evidence tended to show that the classifications to lower grade and pay had been reversed as a result of the appellants' reclassification appeals. Based on that indication, the parties were asked to show cause why these appeals should not be dismissed as moot. Petition for Review (PFR) File, Tab 3. Both parties responded to the Board's Order.

ANALYSIS

The instant appeals are moot.

Consistent with the initial indication in the record that these appeals may have been mooted by the reversal of the reclassifications, we conclude that the record now establishes that they have been. Accordingly, we need not address the alternative theories advanced by the appellants as bases for Board jurisdiction because, to the extent that the Board may have jurisdiction under any of them, the matter is no longer justiciable.

When the Clerk issued his show cause order, he asked for responses, in affidavit form or under penalty of perjury, to several issues relevant to the question of mootness, among them whether the agency had pursued an appeal of the decision that had reversed the downgrade, whether there had been a final decision on any such request, or whether the reversal was final. Further, the agency was asked to address whether the appellants had been made whole.

In reply, the agency submitted a statement under penalty of perjury explaining that it had submitted "through channels" a request for reconsideration to the Department of the Army, but that the Army had decided that the matter should not be pursued. The agency stated that "[t]here will be no further review of the classification decision," and that "[a]ll decisions by other authorities in this case are final." In support, it included a copy of its December 3, 1997 request for review of the decision reversing its reclassification actions, and a copy of the February 20, 1998 Memorandum of the Chief, Policy and Program Development Division, Department of the Army, responding that "this office is unable to support your request for reconsideration ... [and is] returning your request without action." The reply also discussed an apparently related grievance and settlement of a negotiability issue. With respect to the issue of harm, the agency asserted that the appellants were never damaged because they had received retained grade and pay, and that in any event, the question was now moot because of the

complete cancellation of the actions. It stated that there is no record of the reclassification in the appellants' personnel files and that they have been restored to the status quo ante. PFR File, Tab 4.

In their replies, also submitted under penalty of perjury, the appellants argued that they had not, in fact, been returned to the status quo ante because the issue of attorney fees remained, and they asserted that "the agency has not provided proof that the Appellants have been returned to their original positions with the same title, series, grade, and competitive level." They also argued against the relevance of the negotiability matter noted by the agency and stated that none of them are covered by that grievance. PFR File, Tab 5.

Upon consideration of the evidence and claims now in the more fully developed record, we conclude that these appeals are moot.

The Board's authority is limited to those matters over which it has been given jurisdiction to act by law, rule, or regulation of the Office of Personnel Management. Its jurisdiction attaches at the time the appeal is filed, and subsequent actions by the parties generally do not affect that. *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981). 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 unless the agency completely rescinds the action being appealed. *Id*. Thus, the Board may dismiss an appeal as moot if the appealable action is canceled or rescinded by the agency. *See Cooper v. Department of the Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997). For the appeal to be deemed moot, however, the agency's rescission of the appealed action must be complete. *See Bruning v. Veterans Administration*, 834 F.2d 1019, 1021 (Fed. Cir. 1987). That is, the employee must be returned to the status quo ante and not left in a worse position because of the cancellation than he or she would have been in if the matter had been adjudicated. *Taylor v. Department of Education*, 54 M.S.P.R. 406, 410 (1992).

As noted above, the agency asserts under penalty of perjury that the appellants were subject to retained grade and pay during the period that they served in the lower graded positions and that their records have been divested of evidence that they served in those positions at any time. Thus, the agency argues that the appellants have suffered no apparent injury from their temporarily-lowered grades that has not been remedied.

The appellants, however, assert that the agency has provided no proof that it has returned the appellants to their original positions with the same title, series, grade, and competitive level. While it is true that the agency did not provide a copy of the Standard Forms (SF)-50 memorializing the cancellation of the actions, it stated under penalty of perjury that the actions were canceled. The assertion of an agency representative in a pleading generally does not constitute evidence. *See, e.g., Saunders v. U.S. Postal Service*, 75 M.S.P.R. 225, 230 (1997). However, a declaration submitted under penalty of perjury is entitled to considerable weight unless rebutted, especially where it is supported by other evidence, *Vercelli v. U.S. Postal Service*, 70 M.S.P.R. 322, 327 (1996), and such a declaration, if uncontested, proves the facts it asserts. *Woodall v. Federal Energy Regulatory Commission*, 30 M.S.P.R. 271, 273 (1986). Here, the agency's statement is fully consistent with its documentary evidence indicating that it was not authorized to pursue an appeal of the reversal of its reclassification actions. Further, "where an agency completes all steps required by law or regulation to execute a personnel action, an SF-50 adds nothing." *Hintz v. Department of the Army*, 21 F.3d 407, 411 (Fed. Cir. 1994). It "is merely an administrative record of the accomplished action" and does not in itself effect an action. *See Hardy v. Merit Systems Protection Board*, 13 F.3d 1571, 1575 (Fed. Cir. 1994).

The absence of the SF-50s memorializing the cancellations of the downgradings is not fatal, we find, under these circumstances. While the appellants state that the agency "has not provided proof" that they have been fully

restored, neither as a group nor individually have they raised any specific claims that any is, in fact, serving in a position that is in any way different from that held prior to the May 11, 1997 effective date of the appealed actions. Nor has any asserted harm. We conclude, therefore, that the agency's documentary evidence, considered with its sworn statement and in contrast to the appellants' nonspecific claim, constitutes preponderant proof of the cancellation of the May 11 actions and of the appellants' return to the status quo ante. *See* 5 C.F.R. § 1201.56(c)(2) (a preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue).

Based, as well, on the agency's evidence and argument, we find that any concern that the agency's compliance with the reclassification decision may only be temporary is no longer a reason for the continued adjudication of their appeals. The appellants do not assert to the contrary, and the evidence shows that the issue is no longer live. *See Department of Agriculture v. Palmer*, 68 M.S.P.R. 586, 588-89 (1995); *see also, Honig v. Doe*, 484 U.S. 305 n.6 (1988). *Cf. Kagel v. Department of the Army*, 126 F.3d 1455, 1458 (Fed. Cir. 1997).

Finally, the appellants argue that their appeals should not be dismissed because they have not received an attorney fee award to which they believe they are entitled. The Board has long held, though, that an appellant's intention to file a motion for attorney fees does not prevent dismissal of an otherwise moot appeal. *See, e.g., Koerner v. Office of Personnel Management*, 51 M.S.P.R. 365, 367 (1991). Thus, the appellants may file for such an award in accordance with the requirements of the Board's regulations, *see* 5 C.F.R. § 1201.203, and the instant

dismissal will have no prejudicial effect on the outcome of that separate proceeding.[2]

Accordingly, we conclude that the rescission of the actions taken and the appellants' restoration to the status quo ante are complete, so that no justiciable matters remain before the Board. We therefore dismiss the appeals as moot.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal, 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANTS REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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

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[2] Finally, although not raised by the appellants, we note that when an agency completely rescinds an appealed action but the appellant has outstanding, viable claims for compensatory damages before the Board, the agency's complete rescission of the action appealed does not afford him all of the relief available before the Board, and therefore does not render the appeal moot. *Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 197 (1996). The same is true with respect to outstanding, viable claims for an award of consequential damages under the Board's IRA jurisdiction at 5 U.S.C. § 1221. *Walton v. Department of Agriculture*, MSPB Docket No. CH-1221-97-0756-W-1 (May 20, 1998). The instant appeals involve no claim of discrimination that implicates compensatory damages and does not arise under the Board's IRA authority so as to create the potential for an award of consequential damages.

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX

Appeal of Gordon Bolton, et al. v. Department of the Army

The appellants subject to this decision and the docket numbers of their cases are:

Gordon Bolton - DA-0351-97-0450-I-1
Lowell C. Brown - DA-0351-97-0451-I-1
Bernice Crittenden - DA-0351-97-0456-I-1
George A. Durkee - DA-0351-97-0460-I-1
Eric J. Edwards - DA-0351-97-0461-I-1
C.R. Funches - DA-0351-97-0463-I-1
Fred D. Hooper - DA-0351-97-0470-I-1
Jimmie D. Jeane - DA-0351-97-0491-I-1
Marvin G. Jones - DA-0351-97-0492-I-1
Silas H. Klug - DA-0351-97-0504-I-1
Albert L. Lewis - DA-0351-97-0493-I-1
Wayne Lund - DA-0351-97-0496-I-1
Keith Martin - DA-0351-97-0498-I-1
Patrick McCauley - DA-0351-97-0497-I-1
Floyd D. Merchant - DA-0351-97-0499-I-1
Charles E. Merriman - DA-0351-97-0474-I-1
Tommy R. Mitchell - DA-0351-97-0476-I-1
Charles J. Rominger - DA-0351-97-0478-I-1
Paul D. Vinson - DA-0351-97-0482-I-1
Hoyt T. Westbrook - DA-0351-97-0484-I-1