UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

61 M.S.P.R. 504

Docket Number NY-1221-91-0006-W-1

JOSEPH OCCHIPINTI, Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date:

Alan E. Wolin, *Esquire, Lecci, Wolin* and *Wolin,* Hicksville, New York, for the appellant.

Brian E. Meyers, Esquire, Burlington, *Vermont, for the* agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has filed a petition for review of the initial decision dated November 6, 1990, dismissing his individual right of action (IRA) appeal for lack of Board jurisdiction. The agency has moved for dismissal of the appeal as moot because, as the result of the appellant's subsequent removal and his failure to refile a timely appeal of his removal after two dismissals without prejudice at his request, he cannot obtain meaningful relief in his IRA appeal. For the reasons set forth below, we GRANT the agency's motion, VACATE the initial decision, and DISMISS the appeal as moot.

BACKGROUND

The appellant, a GS-13 Supervisory Criminal Investigator, was in charge of the Anti-Drug Smuggling Unit *(ASV) in* the New York District Office of the Immigration and Naturalization Service (INS). In letters to the Office of Special Counsel (OSC) in December of 1989, and in January and February of 1990, the appellant alleged that his agency had retaliated against his in numerous ways for his alleged whistleblowing activities. After OSC closed its investigation, the appellant submitted an IRA appeal to the Board's New York Regional Office.

The administrative judge concluded that the *appellant had* not raised a nonfrivolous claim entitling his to a hearing on Board jurisdiction under the Whistleblower Protection

Act of 1989 (WPA), 5 U.S.C. § 1221(a). He found that the appellant had not alleged an otherwise appealable action because classification actions, alleged diminution of duties, and reassignments that do not result in a loss of grade or pay are not appealable to the *Board. He* further found that the failure to be reclassified to the GS-14 *grade level* occurred prior to the effective date of the WPA, July 9, 1989,[1] and thus that the appellant had no IRA appeal rights on that matter. Finally, he found that the appellant had not exhausted his right to seek corrective action from OSC regarding a possible reorganization/reassignment, as required under 5 U.S.C.§ 1214(a)(3), and so the Board lacked jurisdiction over that matter.

In his petition for review, the appellant renewed his contention that the Board has jurisdiction over the reorganization of the ASU because the matter was raised before the OSC. Hs also alleged that the Board has jurisdiction over the allegations that the agency intended to eliminate *the ASU* in reprisal for his protected disclosures.

Subsequent to the filing of the petition for review, the agency removed the appellant from his position for *criminal* conduct -- he had been convicted in the Southern District Court of New York on seventeen counts of violation of civil rights, deprivation of rights under color of law, and falsifying investigation forms in *connection with his unit's* investigation of suspected illegal drug activity in grocery stores and small businesses in upper Manhattan *and the* Bronx. The removal was affective on November 1, 1991.

The appellant petitioned for appeal of his removal, but the parties entered into a joint stipulation to dismiss the appeal without prejudice to refiling the appeal within 180 days of the latest signature date on the agreement, because *the* appellant was appealing his *conviction* to the U.S. Court of Appeals for the Second Circuit. The administrative judge, therefore*,* dismissed the appeal without prejudice. See *Occhipinti v. Department of Justice,* MSPB Docket No. NY0752920090-I-1 (Initial Decision, Dec. 26, 1991). The decision became final on January 30, 1992.

The U.S. Court of Appeals for the Second Circuit upheld the appellant's conviction, and he was incarcerated on June 12, 1992. He timely refiled his removal appeal, and the parties a[9]ain entered into a stipulation to dismiss the appeal without prejudice to refiling the appeal within 180 days of June 16, 1992, the latest signature date that appears on the agreement, pending possible proceedings brought by the appellant before the U.S. Supreme Court. The administrative judge again dismissed the appeal without prejudice. *See Occhipinti v. Department cf Justice, MSPB* Docket No. NY0752920090-I-2 (June 26, 1992). Neither party petitioned for review, and that decision became final on July 31, 1992.

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[1] We note that, in making this finding, the administrative judge erroneously referred to the effective *data of* the WPA as July 9, 1990, on page 4 of the initial decision; he nonetheless correctly cited the date *elsewhere* in the decision. In addition, we note that, in finding that the appellant did not have the right to appeal the classification action to the Board, the word "not" was omitted in the last sentence of the first paragraph on page 5 of the initial decision. This omission appears to be a typographical error.

Under the terms of the stipulation, the last day for refiling the appeal was December 13, 1992, and the appellant has never refiled his removal appeal. The agency moves to dismiss the appeal as moot because the appellant cannot appeal the removal to the Board and obtain restoration to the agency's rolls. The agency maintains that the appellant therefore cannot obtain meaningful relief in his IRA appeal. The agency asserts that, even if the Board were to hold that any alleged diminution in the appellant's responsibilities or issues involving reassignment are within the Board's jurisdiction as an IRA appeal, there would be no remedy available because the appellant was terminated and so any argument concerning his duties and responsibilities is merely theoretical.

The appellant has responded to the motion. He contends that this appeal should be held in abeyance pending his continuing efforts to have his conviction reversed. If his conviction were reversed, the appellant asserts, he could be reinstated and there would thus be a continuing case or controversy, and he could obtain relief.

ANALYSIS

Mootness occurs either when issues are no longer "live" or whore the parties lack a legally cognizable interest in the outcome of the litigation. *See generally* 6A MOORE'S FEDERAL PRACTICE R 57.13. *See also Horner v. Merit Systems Protection Board,* 815 F.2d 668, 670-71 (Fed. Cir. 1987) ("[a] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome").

As detailed below, the appellant's removal appeal is moot because there is no longer a live case or controversy. More particularly, his IRA appeal is moot because the Board cannot grant him meaningful or *significant* relief, and he, thus, lacks a legally cognizable interest in the outcome of the IRA appeal.

In order to present a live case or controversy, there must be a live case or controversy at the time that a case is decided, not merely at the time the complaint is filed. *See Spectronlcs Corp. v. H.B.* Fuller *Co., Inc.,* 940 F.2d 631, 635 (Fed. Cir.), *cert. denied, 112 S. Ct. 658 (1991). The* appellant's removal appeal was a live matter when it was originally filed. As discussed above, however, the appellant's appeal was eventually dismissed without prejudice to his timely refiling, and he has not refiled it. Thus, there is no present case or controversy involving the appellant's removal pending before the Board.

The appellant claims that, if he could obtain a reversal of his conviction, then he could be reinstated, there would again be a case or controversy, and he could obtain relief. We agree. The appellant is at liberty to file a new appeal at any time. Should the appellant obtain reversal of his conviction, and should he desire to do so, he is free to submit an appeal to the Board's New York Regional Office in an effort to seek reinstatement if the agency declines to reinstate his. That matter, however, would represent a new appeal and a new case or controversy. The administrative judge would be free to resolve the matters presented in that new appeal, including questions of timeliness and/or jurisdiction. At this time, however, there is no case or controversy pending in connection with the appellant's removal, and the Board cannot reverse the removal action taken by the agency.

In his IRA appeal, the appellant claims that, in retaliation for his protected disclosures, the agency threatened to alter or eliminate the ASU, and that it eventually reorganized the Unit and reassigned him. Even assuming, without deciding, that the appellant's claims are true and that the Board has IRA jurisdiction over them *as* "personnel *actions," we can* discern no meaningful corrective relief that we can accord the appellant because *he is no* longer an employee of the agency.

The appellant could obtain correction of paperwork involving a reorganization and a reassignment. Because the appellant is no longer an employee, however, the Board cannot order him reassigned to his former position. Further, there is no showing of any monetary loss to the appellant and no showing of other relief that he could obtain. The appellant, therefore, would gain nothing significant or meaningful from an adjudication of his IRA appeal and he, thus, has no legally cognizable interest in the outcome of this appeal. In *White v. International Boundary Water Commission*, 59 M.S.P.R. 62, 65 (1993), the Board found that, because it could not order the appellant's return to the agency's rolls, the only relief it could award was a declaration that the appellant was temporarily treated improperly. The Board concluded in *White* that such relief was not "effective relief" and therefore mooted the appeal.[2] Id. at 65.

Similarly, here, the only relief the Board could grant would be on paper and such relief is not meaningful or effective. As one court has succinctly put it, "[w]hen events during the pendency of the appeal have eliminated any possibility that the court's order may grant meaningful relief affecting the controversy ... dismissal of the appeal [is appropriate]." *See Alton & Southern Ry. Co. v. International* Ass'n *of* Machinists *& Aerospace Workers,* 463 F.2d 872, 877-78 (D.C. Cir. 1972).

We shall, accordingly, dismiss this appeal as moot.

ORDER

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

NOTICE TO APPELLANT

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,
Washington, DC 20439

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[2] As noted in *White*, the Board is precluded from giving advisory opinions. *See* 5 U.S.C. § 1204(h). We, therefore, cannot render opinions in utters that are moot.

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
Robert E. Taylor, Clerk
Washington, D.C.