UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Ismail Shaishaa, Appellant,

v.

Department of the Army, Agency

Docket Number NY531D920211I1

Date: October 2, 1992

Stuart Lee Karlin, New York City, New York for the appellant.*

James Mercer, New York City, New York for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

On June 29, 1992, the appellant filed a timely petition for review of the May 27, 1992 initial decision that dismissed his appeal as moot. For the reasons discussed below, the petition for review is DENIED, the case is REOPENED on the Board's own motion pursuant to 5 C.F.R. § 1201.117, and the initial decision is AFFIRMED AS MODIFIED. The appeal is DISMISSED for lack of jurisdiction.

BACKGROUND

On January 31, 1992, the appellant filed with the Board's New York Regional Office a petition for appeal in which he contested two agency actions, the denial of his within-grade increase and his placement on a performance improvement plan (PIP). Initial Appeal File (IAF), Tab 1. He claimed that the agency's actions violated the law and were discriminatory on the basis of his national origin,

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* The appellant filed his petition for review *pro se* but did not revoke his designation of Mr. Karlin as his representative pursuant to 5 C.F.R. § 1201.31(a).

Egyptian. *Id.* In acknowledging the petition, the assigned administrative judge noted that it appeared that the appellant was attempting to appeal matters that were not within the scope of the Board's jurisdiction, and he provided him with the opportunity to show that they were. The appellant responded, asserting that the Board could properly take jurisdiction over the appeal, *id.* at Tabs 5 and 6, and the agency responded with a request that it be dismissed. *Id.* at Tab 3. The agency based its position on its belief that the appeal had been mooted by the retroactive grant of the within-grade increase and on its argument that placement on a PIP is not a matter within the Board's review authority.

After providing for the receipt of further representations, the administrative judge dismissed the appeal as moot for the reasons advanced by the agency. *Id.* at Tab 8. He found that the retroactive grant of the previously-denied increase gave the appellant the relief for which he was entitled to appeal, that the discrimination allegation does not confer jurisdiction on the Board, that the Board has no jurisdiction over an employee's placement on a PIP, and that there was no need to hold a hearing on the threshold issue of jurisdiction under the circumstances. *Id.*

The appellant has now filed a petition for review of that decision, to which the agency has responded in opposition. He contends that he has not yet seen the within-grade increase reflected in his pay, and that he has now been served with a notice of proposed removal. Based on these factors, he asserts that the Board should retain jurisdiction over the appeal. The agency's submission attaches a Standard Form (SF)-50, intended to prove that the within-grade increase denial has been cancelled, thus providing a basis for dismissal of the appeal.

ANALYSIS

<u>Because the Board lacked jurisdiction over both of the appealed matters, the appeal should have been dismissed for lack of jurisdiction rather than for mootness.</u>

The administrative judge correctly found that where the action that is the subject of an appeal has been cancelled, the Board loses jurisdiction over it because the matter has been removed from controversy and thereby mooted. *See, e.g., Himmel v. Department of Justice,* 6 M.S.P.R. 484 (1981). This is so as long as the appellant consents to the divestiture of jurisdiction or the agency cancels the action completely. *Id.* at 486. We have held that to cancel a within-grade increase denial, thereby rendering it moot, an agency must return the appellant to the *status quo ante* by cancelling the action, paying him retroactively for the period of the denial, removing all references to the action from the employee's personnel record, and amending the acceptable level of competence determination and the underlying performance evaluation. *See Veal v.*

Department of the Army, 52 M.S.P.R. 66, 68 (1991). When the appeal was before the administrative judge, the agency had submitted no documentation to support a finding that any of these actions had been taken, and it was, therefore, error to predicate dismissal of the appeal on the agency's cancellation.

We need not decide whether the agency's submission on petition for review cures the defect, however, because we find that the appeal was not properly before the administrative judge at all. *See Himmel,* 6 M.S.P.R. 484, holding that, absent divestiture, the agency's action at the time the appeal is filed determines the Board's jurisdiction. At the time of the appeal, the appellant's within-grade increase had been denied, but the agency had not affirmed that denial upon reconsideration. As the administrative judge's acknowledgment order noted, the Board lacks jurisdiction over such an initial denial. It is only the agency's affirmance of that denial upon reconsideration that is appealable. *See* 5 C.F.R. § 531.410(d); *see also, e.g., Renshaw v. Department of the Army,* 23 M.S.P.R. 441, 442 (1984). This is so unless the agency has been unreasonable in failing or refusing to act on a request for reconsideration. *See, e.g., Martinesi v. Equal Employment Opportunity Commission,* 24 M.S.P.R. 276, 280 (1984). In the instant case, there is no evidence or argument that the appellant requested and was denied reconsideration of the denial of his within-grade increase. The record shows only that pursuant to a counseling report concerning his discrimination complaint, the appellant was informed that the agency would retroactively grant the increase. *See* IAF, Tab 3C.

Under the circumstances, we find that the denial of the increase did not represent an appealable event. Thus, the administrative judge should not have dismissed the appeal as moot based on the imperfect cancellation, but should have dismissed it for lack of jurisdiction over its subject matter from the beginning. *Cf. Shaw v. Department of the Navy,* 39 M.S.P.R. 586, 594 (1989) (the Board may not assert jurisdiction it lacks; thus, the administrative judge must determine, *inter alia,* that the subject matter of an appeal is within the Board's jurisdiction before dismissing it on the basis of an agreement to settle it). The error was not prejudicial to the appellant, however, because the result is the same, and thus it provides no basis for reversal of the initial decision. *Panter v. Department of the Air Force,* 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

We find, though, that the administrative judge correctly held that the appellant's placement on a PIP was not a matter that is appealable to the Board. *See* 5 U.S.C. §§ 4303(e), 7513 (limiting appeals under 5 U.S.C. Chapters 43 and 75 to employees who have been, respectively, reduced in grade or removed, and those who have suffered adverse actions). That the appellant may be subjected to an appealable action as a result of his performance under the PIP, as the

administrative judge recognized, is speculative and not a proper basis for the current assertion of jurisdiction. *See* initial decision at 3; *Alford v. Department of Health & Human Services,* 1 M.S.P.R. 317 (1980).

Additionally, because the administrative judge properly held that the appellant's allegation of discrimination does not provide a basis for the assertion of jurisdiction in the absence of an otherwise appealable matter, *see Wren v. Department of the Army,* 2 M.S.P.B. 174, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd sub nom.Wren v. Merit Systems Protection Board,* 681 F.2d 867, 871-73 (D.C.Cir. 1982), and because facts sufficient to raise a colorable claim of jurisdiction have not been asserted, the appellant's request for a hearing was correctly denied.

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

NOTICE TO THE 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, N.W.
Washington, D.C. 20439

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.