

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 17

Docket No. AT-4324-09-0507-I-1
AT-4324-09-0508-I-1

James Argabright,

Appellant,

v.

Department of Defense,

Agency.

January 21, 2010

Kiley D. Scott, Esquire, Albany, New York, for the appellant.

Roland D. Meisner, Esquire, Alexandria, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that dismissed without prejudice these appeals under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeals for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed two separate appeals claiming that the agency violated USERRA by improperly charging him military leave on non-work days, which caused him to use annual leave, sick leave, or leave without pay to perform military duty. *Argabright v. Department of Defense*, Docket No. AT-4324-09-0507-I-1, Initial Appeal File (IAF1), Tab 1; *Argabright v. Department of Defense*, Docket No. AT-4324-09-0508-I-1, Initial Appeal File (IAF2), Tab 1. The appeals were joined for adjudication. IAF1, Tab 6; IAF2, Tab 6. The administrative judge scheduled a hearing for 11:00 a.m. on July 16, 2009, and ordered the parties to file their prehearing submissions, including statements of all facts and issues, to be received in the regional office on or before July 8, 2009. IAF1, Tab 13 at 1; IAF2, Tab 11 at 1.

¶3 However, on July 16, 2009, 30 minutes before the scheduled hearing, the appellant submitted via facsimile a document identifying for the first time additional dates that he claims the agency improperly required him to use non-military leave to perform military duty. IAF1, Tab 20 at 2. In light of the late-raised allegations, the administrative judge suspended the processing of the appeals for 30 days to allow the parties time to pursue additional discovery and settlement. IAF1, Tab 21.

¶4 During the 30-day period, the appellant's attorney filed a motion to dismiss the appeal without prejudice. The sole basis for the motion was that "[t]he Appellant is suffering from a medical condition that renders him unable to proceed with the case at this time." IAF1, Tab 22 at 2. The next day, the administrative judge issued an initial decision granting the appellant's motion and dismissing the appeals without prejudice. IAF1, Tab 24, Initial Decision (ID) at 1-2. The initial decision stated that the dismissal was to allow the appellant time to recover from his condition; it did not specify a deadline for refiling. ID at 2.

¶5 The agency has filed a petition for review, arguing that the administrative judge abused his discretion in dismissing the appeals without prejudice. Petition

for Review File (PFRF), Tab 1 at 4-6. The agency requests that the Board sanction the appellant by dismissing the appeals with prejudice, or, in the alternative, remand the appeals for further adjudication under specified conditions. *Id.* at 4, 6. The appellant has not filed a response.

ANALYSIS

¶6 An administrative judge has wide discretion to control the proceedings before him and the dismissal without prejudice to refile is a procedural option committed to his sound discretion. *Gingery v. Department of the Treasury*, [111 M.S.P.R. 134](#), ¶ 9 (2009). Nevertheless, the administrative judge must exercise his discretion in a manner consistent with the policies set forth by the Board. *Selig v. Department of the Army*, [102 M.S.P.R. 189](#), ¶ 6 (2006).

¶7 In this case, the appellant failed not only to substantiate the existence of his medical condition, he failed even to identify or describe the condition. He did not explain why the condition rendered him unable to proceed with his appeals, and he did not indicate how long the condition might be expected to persist. Moreover, it does not appear that the agency had an adequate opportunity to respond to the appellant's motion before the administrative judge ruled on it. ID at 1; IAF, Tab 22; *see Paine v. Department of Health & Human Services*, [32 M.S.P.R. 135](#), 137 (1987) (before dismissing the appeal without prejudice due to the appellant's alleged medical condition, the administrative judge should have required the appellant to submit a supporting affidavit and given the agency an opportunity to respond). The agency has now challenged the appellant's contention that his alleged medical condition renders him unable to proceed with the appeals at this time. PFRF, Tab 1 at 5. Under the circumstances, we find it appropriate to remand for further development of the record regarding the basis for a dismissal without prejudice.

¶8 In addition, the administrative judge abused his discretion in dismissing the appeals without prejudice without setting a refile date. The Board disfavors

dismissals without prejudice that do not contain a specific refiling date, especially where it is unclear when the matter underlying the dismissal will be resolved. *See Selig*, [102 M.S.P.R. 189](#), ¶¶ 6-7; *Schulte v. Department of the Air Force*, [100 M.S.P.R. 141](#), ¶ 6 (2005); *Davis v. U.S. Postal Service*, [91 M.S.P.R. 75](#), ¶ 7 (2002). Given the Congressional mandate that Board cases be expeditiously adjudicated, a case may not go on indefinitely. *Ayers v. National Aeronautics & Space Administration*, [80 M.S.P.R. 550](#), ¶ 7 (1999).

¶9 The agency requests that the Board dismiss these appeals with prejudice. PFRF, Tab 1 at 6. We deny the agency's request because the evidence does not support a finding that dismissal would serve the ends of justice. *See 5 C.F.R. § 1201.43* (sanctions may be imposed upon a party as necessary to serve the ends of justice). Dismissal for failure to prosecute is the most severe sanction available to the Board, and it should be reserved for limited circumstances. *See Toombs v. Department of the Army*, [69 M.S.P.R. 78](#), 81 (1995). In this case, the appellant has failed to comply with only one of the administrative judge's orders, IAF1, Tab 13 at 1, Tab 20; IAF2, Tab 11 at 1, and there is no evidence that he has acted in bad faith or intends to abandon his appeals. The Board has found it generally inappropriate to sanction an appellant with dismissal under these circumstances.* *E.g., Hay v. U.S. Postal Service*, [106 M.S.P.R. 151](#), ¶ 11 (2007); *Gordon v. Department of the Air Force*, [104 M.S.P.R. 358](#), ¶ 4 (2006).

¶10 The agency requests, in the alternative, that these appeals be reassigned to a different administrative judge on remand, and it submits a series of e-mail communications involving the administrative judge. PFRF, Tab 1 at 4, 8-10. We deny the agency's request that the appeals be reassigned. Although the dismissal without prejudice constituted an abuse of discretion, this case-related ruling is

* On remand, the appellant must be more diligent in complying with the administrative judge's orders and in pursuing his appeals to avoid the imposition of sanctions to serve the ends of justice. *See Bilandzich v. Department of the Army*, [111 M.S.P.R. 301](#), ¶ 9 (2009).

insufficient to overcome the presumption of honesty and integrity that accompanies the administrative judge. *See Wadley v. Office of Personnel Management*, [103 M.S.P.R. 227](#), ¶ 12 (2006). In addition, our review of the administrative judge's e-mail communications reveals nothing improper. PFRF, Tab 1 at 8-10.

¶11 The agency further requests that if the appeals are remanded, they be decided either on the written record or after an in-person hearing, rather than a telephonic hearing as was originally scheduled. *Id.*; IAF1, Tab 13 at 1; IAF2, Tab 11 at 1. We also deny this request. The appellant has a right to a hearing in these USERRA appeals, *see Kirkendall v. Department of the Army*, [479 F.3d 830](#), 844-46 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007), and we decline to sanction him without warning by depriving him of that right. Further, any decision regarding the manner in which any hearing is to be conducted is for the administrative judge in the first instance because he is the one responsible for convening and regulating the course of the hearing. *See* [5 C.F.R. § 1201.41\(b\)\(6\)](#). If the agency has any objection to the manner of the hearing, it should state its objection to the administrative judge. *See Harbo v. U.S. Postal Service*, [53 M.S.P.R. 450](#), 455 (1992).

ORDER

¶12 Accordingly, we remand these appeals to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall allow the parties to present evidence and argument regarding whether the appeals should be dismissed without prejudice or the proceedings delayed in another appropriate manner. *See Hoehing v. U.S. Postal Service*, [83 M.S.P.R. 314](#), ¶ 8 (1999). If the administrative judge finds that the appeals should be dismissed without prejudice in the interests of fairness, due process, and administrative efficiency, he shall set a date certain by which the appeals must be refiled.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.