

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

2010 MSPB 25

Docket No. CB-7121-09-0014-V-2

**Patrick Ryan,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

January 29, 2010

Joe Goldberg, Washington, D.C., for the appellant.

J. Douglas Whitaker, Esquire, Omaha, Nebraska, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 Pursuant to the terms of a settlement agreement reached by the parties in the appellant's request for Board review of an arbitrator's decision, the Board dismissed the appeal without prejudice and subsequently the Clerk of the Board automatically refiled the request. The agency then filed a motion to dismiss the appellant's request for review pursuant to additional terms of the parties' settlement agreement. For the reasons set forth below, the Board GRANTS the agency's motion and DISMISSES the request for review with prejudice.

BACKGROUND AND ANALYSIS

¶2 The agency placed the appellant, a federal law enforcement officer with the Federal Protective Service, on enforced leave without pay effective October 5, 2007. Request for Review File (RRF), Tab 1, Attachment 1. The agency based its action on the appellant's multiple health conditions, i.e., diabetes, hearing loss requiring the use of a hearing aid, alcoholism, and depression. *Id.* The appellant's collective bargaining representative, the American Federation of Government Employees, grieved the appellant's placement on enforced leave, and eventually moved the matter to arbitration pursuant to the arbitration provisions of its collective bargaining agreement. *Id.* In his decision on the matter, the arbitrator found that the agency had "just and sufficient" cause to place the appellant on enforced leave and denied the grievance. *Id.*

¶3 The appellant filed a timely request for review of the arbitrator's decision pursuant to the provisions of [5 U.S.C. § 7121\(d\)](#). RRF, Tab 1. While the request for review was pending, the parties submitted a settlement agreement. Reinstated RRF, Tab 2. The agreement provides for the dismissal of the request for review without prejudice to refiling until November 10, 2009, to allow the appellant an opportunity to apply for disability retirement benefits from the Office of Personnel Management (OPM). Reinstated RRF, Tab 2. The agreement also provides that the request for review will be dismissed with prejudice to refiling in the event that OPM approves the appellant's disability retirement application. *Id.* The Board issued a decision finding that it had jurisdiction over the request, the parties had entered into a settlement agreement, understood its terms, and, pursuant to the intent of the parties, entered the agreement into the record for enforcement by the Board. *Ryan v. Department of Homeland Security*, [112 M.S.P.R. 43](#), ¶¶ 2, 5 (2009). Pursuant to the settlement agreement, the Board dismissed the appellant's request for review without prejudice and informed the parties that it would refile the request on its own motion on November 10, 2009,

to process the case from the point at which the dismissal was granted. *Ryan*, [112 M.S.P.R. 43](#), ¶ 6.

¶4 The Board automatically refiled the request for review on November 10, 2009. Reinstated RRF, Tab 1. The agency submitted a motion to dismiss. Reinstated RRF, Tab 2. In its motion, the agency stated that, on October 1, 2009, OPM approved the appellant's application for disability retirement. *Id.* Thus, the agency moved the Board to dismiss the request for review pursuant to the terms of the parties' settlement agreement. *Id.* Pursuant to the agency's motion, the Board informed the appellant that it had refiled his request for review and that the agency had moved to dismiss the request, and provided him an opportunity to respond to the agency's motion on or before December 5, 2009. Reinstated RRF, Tab 3. The Board informed the appellant that, if he did not respond to the agency's motion to dismiss, the Board may assume that he was satisfied and would dismiss the request for review. *Id.*

¶5 The appellant has not responded. Accordingly, pursuant to the terms of the settlement agreement reached by the parties, the Board grants the agency's motion to dismiss the appellant's request for review with prejudice.

ORDER

¶6 This is the final decision of the Merit Systems Protection Board in this request for review. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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