

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
NORTHEASTERN REGIONAL OFFICE**

DIANA M. RUBENS,  
Appellant,

DOCKET NUMBER  
PH-0707-16-0081-J-1

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: December 2, 2015

Debra L. Roth, Esquire, Conor D. Dirks, Esquire, and Julia H. Perkins,  
Esquire, Washington, D.C., for the appellant.

Jonathan Smith, Esquire, Paul V. Usera, Bedford, Massachusetts, and  
Nicholas E. Kennedy, Esquire, Huntington, West Virginia, for the  
agency.

**BEFORE**

William L. Boulden  
Chief Administrative Judge

**FINAL DECISION**

On November 27, 2015, appellant, a former career, non-probationary Senior Executive Service (SES) Director for the Department of Veterans Affairs (VA's) Veterans Benefits Administration (VBA) Philadelphia Regional Office (Philadelphia VARO), timely electronically filed an appeal from her November 20, 2015 removal from the SES and transfer to the General Schedule (GS) 15, step 1 position of Regional Assistant Director, Houston VARO, based upon alleged misconduct. Appeal File (AF), Tab 1. Appellant's salary was decreased from \$181,497.00 to \$123,775.00 per annum. AF, Tab 29 (exhibit 1). The Board

has jurisdiction under 38 U.S.C. § 713(d)(2)(A),(g)(1)(A) and 5 U.S.C. § 7701. *See* 5 C.F.R. §§ 1210.1, 1210.2(a). This appeal received expedited review as required by 38 U.S.C. § 713(e), which meant, among other things, that the appeal could not be suspended, dismissed without prejudice, or stayed, and the undersigned was required to issue a decision within 21 days after the appeal was filed. 38 U.S.C. § 713(e)(3-4); 5 C.F.R. §§ 1210.1(c), 1210.3(a)(3-4). It further means that this decision is final and is not subject to any further appeal. 38 U.S.C. § 713(e)(2); 5 C.F.R. §§ 1210.1(d), 1210.20(b). For the following reasons, the appeal is DISMISSED as MOOT.

### MOOTNESS

Even though an action may be within the Board's jurisdiction, subsequent events may render an appeal moot and foreclose the Board's review. Mootness can arise at any stage of litigation, and an appeal will be dismissed as moot when, by virtue of an intervening event, the Board cannot grant any effectual relief in favor of the appellant, as when the appellant, by whatever means, obtained all of the relief she could have obtained had she prevailed before the Board and thereby lost any legally cognizable interest in the outcome of the appeal. *Price v. U.S. Postal Service*, 118 M.S.P.R. 222, ¶ 8 (2012).

However, 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 the agency completely rescinds the action being appealed. For an appeal to be deemed moot, the agency's rescission must be complete, i.e., the appellant must be returned to the *status quo ante* and not left in a worse position as a result of the cancellation than she would have been in if the matter had been adjudicated and she had prevailed. *Id.*

On November 30, 2015, the agency filed a motion to dismiss the appeal as moot and to stay case-related deadlines, and attached exhibits showing that the

deciding official had rescinded his Notice of Pending Action and Decision Letter, and personnel action forms reflected the retroactive cancellation of the action taken against appellant. AF, Tab 27. That same day, I denied the motion because it was not clear that appellant had been completely restored to the *status quo ante* or that she consented to dismissal. AF, Tab 28.

On December 1, 2015, we had two teleconferences (at 1:00 p.m. and 5:00 p.m.) to discuss various concerns that appellant had about the issue of full restoration (pay and backpay, return to her former position, expungement of negative information from her official personnel file, etc.). Ultimately, based upon agency affidavits, evidence, and the representations of agency counsel, appellant consented to the dismissal of the appeal as moot. AF, Tab 34.

I note that appellant has not raised defenses of discrimination or whistleblowing reprisal, which, because of the possibility of monetary damages, could preclude a mootness dismissal. For all of these reasons, it is appropriate to dismiss the appeal as moot.

### **DECISION**

The appeal is DISMISSED as MOOT.

FOR THE BOARD:

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William L. Boulden  
Chief Administrative Judge

### **NOTICE TO APPELLANT**

Pursuant to 38 U.S.C. § 713(e)(2), this decision is final and not subject to any further appeal.