U.S. MERIT SYSTEMS PROTECTION BOARD

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15-3023

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of *Nina E. Olson v. Department of the Treasury*, MSPB Docket No. DC-0752-14-0100-I-1, and that the administrative record is under my official custody and control on this date

on file in this Board

December 8, 2014
Date

William D. Spencer
Clerk of the Board

CERTIFICATE OF SERVICE

I hereby certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

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December 8, 2014
(Date)

William D. Spencer
Clerk of the Board

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NINA E. OLSON

v.

DEPARTMENT OF THE TREASURY

MSPB Docket No. DC-0752-14-0100-I-1

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

NINA E. OLSON,
Appellant,

v.

DEPARTMENT OF THE TREASURY,
Agency.

DOCKET NUMBER
DC-0752-14-0100-I-1

DATE: July 18, 2014

A. Lavar Taylor, Esquire, and Robert S. Horwitz, Esquire, Santa Ana, California, for the appellant.

Byron D. Smalley, Esquire, and Robert M. Mirkov, Esquire, Washington, D.C., for the agency.

BEFORE
Andrew Niedrick
Administrative Judge

INITIAL DECISION

The appellant filed an appeal with the Merit Systems Protection Board (Board) from an agency action that placed her in a furlough status during the government shutdown from October 1 to 17, 2013. Appeal File (AF), Tab 1. For the following reasons, the appeal is DISMISSED for lack of jurisdiction or, in the alternative, as moot.[1]

[1] I apologize for the delay in the issuance of this decision. The massive influx of furlough appeals coupled with a scarcity of resources at the Board have dramatically impacted case processing times in the regions.

ANALYSIS AND FINDINGS

Background

The agency appointed the appellant to the National Taxpayer Advocate (NTA) position in the Office of the Taxpayer Advocate within the Internal Revenue Service (IRS) in early 2001 pursuant to 26 U.S.C. § 7803(c). AF, Tabs 1, 9 and 11. In this position, she is in charge of the Taxpayer Advocate Service (TAS) and she has served continuously as the NTA since March 1, 2001. *Id*. From October 1 to 16, 2013, the agency furloughed the appellant during the government shutdown pursuant to the agency's FY 2014 Shutdown Contingency Plan. *Id*. The appellant returned to work on October 17, 2013, and the agency paid her back pay and other related benefits for the period covered by the shutdown. *Id*.

On October 30, 2013, the appellant filed this appeal and alleged the agency improperly furloughed her during the government shutdown. AF, Tab 1. For requested relief, she asked the Board to order the agency to amend its Shutdown Plan to except the NTA and TAS staff in her office from furlough actions and to order the agency to obtain the personal approval and signature of the Secretary of the Treasury in the event the agency intended to furlough the NTA and/or TAS staff in future shutdowns. *Id*.

On December 17, 2013, I conducted a telephonic status conference with the representatives of record and the appellant. AF, Tab 10. During the call, I explained that the appeal appeared to be moot because the appellant had received all of the relief she could have received if the matter had been adjudicated before the Board and she had prevailed, i.e., back pay and related benefits. *Id*., (citing *Green v. Department of Air Force*, 114 M.S.P.R. 340, ¶ 7 (2010); *see also Prichard v. Department of Defense*, 484 Fed.Appx. 489, **2 (Fed. Cir. 2012)

(Board's authority to award damages and/or relief is limited)).[2] The appellant disagreed and, as such, I ordered the parties to file evidence and argument on this issue. *Id.*, Tab 10.

On December 31, 2013, the appellant timely responded to my order. AF, Tab 9. In her response, she concedes that she was reinstated with back pay and related benefits for the period October 1 to 16, 2013 but argues that her appeal is not moot because the Board has the authority to:

> 1) order the agency to amend its shutdown policy to include a requirement that it "obtain the personal approval and signature of the Secretary before she is furloughed in any future shutdowns";
>
> 2) order the agency to exempt the appellant and her staff from any future furlough when the IRS "continues to engage in the assessment and collection of tax, . . . including the provision of relief where the protection of human life and property are implicated, and the protection of taxpayer confidentiality when it is deemed necessary to open mail addressed to the National Taxpayer Advocate and her employees"; and
>
> 3) make "a determination that, pursuant to 26 USC §7803(c)(2)(D), the National Taxpayer Advocate is granted sole authority, in consultation with appropriate IRS supervisory personnel, to take personnel action (including dismissals and furloughs) against members of the National Taxpayer Advocate staff and that, as a result, the furlough by the Commissioner of the staff of the National Taxpayer Advocate during the October 1 through 16,2013, shutdown was illegal."

Id., at 4.

Although she acknowledged that there is no specific statutory or regulatory authority on point to support a finding that the Board is vested with the authority to grant the relief she seeks, she argues that its authority is implied because the

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[2] The Board will rely on an unpublished, non-precedential Federal Circuit decision if it finds the court's reasoning persuasive. *Maibaum v. Department of Veterans Affairs*, 116 M.S.P.R. 234, ¶ 15 n. (2011).

Board does have the authority to grant "'appropriate relief' in cases under its appellate jurisdiction." *Id.*, at 18. More specifically, she argues:

> [G]iven the absence of any express limitation on the relief which the Board may grant, and given the Supreme Court's pronouncement in *Elgin v. Department of Treasury*, [132 S.Ct. 2126 (2012)] that Congress intended that appeals to this Board be the exclusive remedy for challenging the personnel actions set forth in 5 U.S.C. § 7512, the Board, if it has jurisdiction, necessarily has the ability to grant the type of relief requested by the Appellant.

Id., at 18-19.

In its timely response to my order, the agency argues that the appeal is, in fact, moot because the appellant had been returned to the *status quo ante* and has received all of the relief the Board could have granted if she had prevailed. AF, Tab 11.

Applicable Law and Findings

The Boards jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Jurisdiction is determined by the nature of the agency's action against a particular appellant at the time an appeal is filed with the Board. *Mackelprang v. U.S. Postal Service*, 48 M.S.P.R. 23, 26 (1991) (citing *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981). When an agency unilaterally rescinds or cancels an appealable action *before* an appeal is filed with the Board and the appellant has been returned to the *status quo ante*, the Board will dismiss the appeal for lack of jurisdiction. *Mackelprang*, 48 M.S.P.R. at 26.

When an agency unilaterally rescinds an action *after* a Board appeal has been filed, the agency's rescission action cannot divest the Board of jurisdiction unless the appellant consents to such divesture or the agency completely rescinds the action being appealed. *Price v. U.S. Postal Service*, 118 M.S.P.R. 222, ¶ 8 (2012); *Green v. Department of the Air Force*, 114 M.S.P.R. 340, ¶ 7 (2010); *Vidal v. Department of Justice*, 113 M.S.P.R. 254, ¶¶ 4 and 5 (2010); *Haskins v.*

Department of the Navy, 106 M.S.P.R. 616, P 15 (2007), *review dismissed*, 267 Fed.App'x 934 (Fed. Cir. 2008). Under these circumstances, the Board will dismiss the appeal as moot if the action has been completely cancelled or rescinded and the appellant has received all of the relief that she could have received if the matter had been adjudicated and he had prevailed. *Price*, 118 M.S.P.R. 222, ¶ 8; *Green*, 114 M.S.P.R. 340, ¶ 7 (citing *Murphy v. Department of Justice*, 105 M.S.P.R. 443, ¶ 5); *see also Vidal*, 113 M.S.P.R. 254, ¶¶ 4 and 5. If an appeal is not truly moot despite cancellation of the action under appeal, the proper remedy is for the Board to retain jurisdiction and to adjudicate the appeal on the merits. *Id*.

Here, the unrefuted record demonstrates the appellant was returned to the *status quo ante* as of October 17, 2014, after Congress and the President signed legislation that effectively cancelled the furlough, returned her to her NTA position, and compensated her for full back pay and related benefits. *See* AF, Tabs 9 and 11. Accordingly, the unrefuted record proves the appellant received all of the relief that she could have received if the matter had been adjudicated before the Board and she had prevailed. Consequently, this appeal must be dismissed for lack of jurisdiction. *Mackelprang*, 48 M.S.P.R. at 26; *see also Harris v. Department of the Air Force*, 96 M.S.P.R. 193, 196 (2004).

The appellant contends that she has not been restored to the *status quo ante* because Congress, and not the Commissioner, granted her back pay and benefits, noting that the "Commissioner did not rescind his prior decision to furlough Appellant." AF, Tab 9 at 20. In its response, the agency has introduced unrefuted evidence to show that the agency did, in fact, cancel the furlough action pursuant to agency policy as provided in the FY 2014 Shutdown Contingency Plan. *Id*., Tab 1 at 88 and Tab 11 at 14. Specifically, the plan provides that "Reactivation of functions is effected when funds are appropriate for the IRS to continue its mission" and "Upon this event all furloughed employees are able to

return to work." *Id*. As such, the appellant's unsupported contention is refuted by the record evidence.

Moreover, the appellant has failed to explain how or why this distinction, if true, is relevant to the issue in this case. For a rescission action to be complete, the appellant must not be "left in a worse position as a result of the cancellation than [s]he would have been in if the matter had been adjudicated and [s]he had prevailed." *Price*, 118 M.S.P.R. 22, ¶ 8. Here, the furlough action was cancelled and the appellant was placed back into her position with back and related benefits. As such, she has been returned, by definition, to the *status quo ante*. Any distinction relating to the entity responsible for cancelling the action places form over substance and does nothing to advance this appeal particularly in light of the relief she has requested in this case.[3]

The appellant also argues that she has not been restored to the *status quo ante* because "the Commissioner has not rescinded the IRS' 2014 Shutdown Contingency Plan and he still asserts that he had (and continues to have) the authority to furlough Appellant and the entire TAS staff and that his furlough of Appellant and the entire TAS staff was proper under the Anti-Deficiency Act." AF, Tab 9 at 20. The unrefuted record, however, demonstrates that the Shutdown Contingency Plan and the Commissioners related "assertions" predate the furlough action and, as such, the appellant is seeking relief unrelated to the action she has appealed.

The appellant next argues that the "Board would have jurisdiction over this case as one that is 'capable of repetition but avoiding review.'" AF, Tab 9 at 21 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). The appellant is

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[3] Even assuming the appellant could demonstrate the furlough action was not formally "rescinded," a furlough is not a disciplinary action in nature and, thus, she has failed to explain how this distinction is relevant to a jurisdictional determination and/or a finding that she has been returned to the *status quo ante*. *Chandler v. Department of the Treasury*, 120 M.S.P.R. 163, ¶ 31 (2013).

mistaken. As a preliminary matter, the agency properly notes that the Board is prohibited by statute from issuing advisory decisions. AF, Tab 11 at 19 (citing 5 U.S.C. § 1204(h)) and *Villarreal v. Department of the Treasury*, 13 M.S.P.R. 82, 84 (1982)). In addition, the appellant has failed to show the Board should apply the narrow exception to the mootness doctrine in cases wherein the appellant shows that an improper action "is capable of repetition" without review. *See* AF, Tab 9 at 21-22. Specifically, she has failed to show that there is a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur in the future for the reasons discussed by the agency in its response. *Id.*, Tab 11 at 19-21.

Finally, the appellant has failed to provide a citation to any law, rule, regulation, or case that would vest the Board with the authority to award the type of sweeping and prospective relief she seeks in this case. *See Prichard*, 484 Fed.Appx. 489 (Board does not have authority to award non-pecuniary damages absent statutory or regulatory authorization). Moreover, I find that her requested relief would fail to qualify as "appropriate relief" under any standard and it appears that she is simply using and manipulating the Board process to litigate a policy dispute between herself and the Commissioner.

For all of these reasons, I find the agency has restored the appellant to the *status quo ante* prior to the submission of her appeal. As such, this case must be dismissed for lack of jurisdiction

DECISION

The appeal is DISMISSED.

FOR THE BOARD: _____/S/_____
Andrew Niedrick
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **August 22, 2014**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and

may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by

electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

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July 18, 2014
(Date)

/s/
Crystal Q. Wilson
Paralegal Specialist