

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

MARTIN AKERMAN,
Appellant,

DOCKET NUMBER
DC-0752-23-0457-S-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: May 4, 2023

Martin Akerman, Arlington, Virginia, pro se.

Eugene R. Ingrao, Sr., Esquire, Arlington, Virginia, for the agency.

BEFORE
Joshua Henline
Administrative Judge

ORDER DISMISSING STAY REQUEST

On May 3, 2023, the appellant filed an appeal alleging his June 18, 2022 retirement was involuntary or that he was constructively discharged on the same date. *See* Initial Appeal File (IAF), Tab 1. In a pleading filed in the instant appeal on May 4, 2023, the appellant sought a stay of his constructive removal or involuntary retirement.¹ Stay Appeal File (SAF), Tab 1. For the following reasons, the appellant's stay request is DISMISSED.

¹ It was unclear if the appellant was seeking to stay his constructive discharge/involuntary retirement or to stay the case processing in the initial appeal. Nevertheless, as the appellant is *pro se*, this stay request was docketed.

ANALYSIS AND FINDINGS

In his initial appeal, the appellant stated in the narrative portion of his appeal form that “The Agency refuses to respond to OPM and has lied to OPM LMER and DOL-OWCP as it relates to my constructive dismissal.” IAF, Tab 1. He also alleged he was “constructively forced into retirement;” “has been under false arrest and false imprisonment since 14 February 2022;” “the [a]gency refuses to respond to OPM since November 2022;” “the [a]gency initially blamed an officer of the Nevada Air National Guard, [but] now appears to be blaming the Army National Guard;” “he is disabled and on Medicaid without income;” and he requested an “urgent intervention by way of the Office of Workmans Compensation Programs.” *Id.* at 4.

On the May 4, 2023, the appellant filed his stay request wherein he averred, in part, that he requested a stay to “ensure that all pertinent issues are examined thoroughly and that the administrative process is properly conducted while also acknowledging the significance of the right to counsel in a criminal matter and the importance of administrative decisions.” SAF, Tab 1 at 4.

Under 5 U.S.C. § 1221(c), an appellant may request a stay of the personnel action that he alleges is based on whistleblowing. Such a stay request may be filed at any time after the appellant becomes eligible to file an appeal with the Board under 5 C.F.R. § 1209.5, but no later than the time limit set for the close of discovery in the appeal. 5 C.F.R. § 1209.8(a). The request may be filed prior to, simultaneous with, or after the filing of an appeal. *Id.* The appellant’s stay request was filed after he filed his initial appeal. SAF, Tab 1.

The appellant has not alleged in his initial appeal or in his stay request that his constructive discharge or involuntary retirement was based on whistleblowing. Accordingly, he is not eligible to file a stay request. *See* 5 U.S.C. § 1221(c). Even if he were eligible to file such a request, the Board’s regulations require that such a request be accompanied by certain information. 5 C.F.R. § 1209.9. In his stay request, the appellant referenced that she would

like to provide evidence of her whistleblowing and protected activity but the regulations are clear that the stay request must include, *inter alia*, the following:

- (4) A chronology of facts, including a description of the appellant's disclosure and the action that the agency has taken or intends to take;
- (6) Evidence and/or argument showing that:
 - (ii) The action complained of was based on whistleblowing or other protected activity as defined in § 1209.4(b) of this part; and
 - (iii) There is a substantial likelihood that the appellant will prevail on the merits of the appeal;
- (7) Evidence and/or argument addressing how long the stay should remain in effect; and

Id. The appellant failed to provide this information with his stay request.

It is incumbent on the appellant to provide the information required by the regulations so that the Board can determine whether there is a substantial likelihood that he will prevail on the merits of his appeal. As the appellant failed to provide the required information with his stay request, the stay request must be dismissed.^{2 3}

² Because the appellant's alleged constructive removal was effective on June 18, 2022, *see* IAF, Tab 1 at 3, a request for stay of his constructive removal may be moot. *See Horner v. Merit Systems Protection Board*, 815 F.2d. 668, 670-71 (Fed. Cir. 1987). An issue must be "live" at the time the case is decided, not merely when the appeal is filed. *See Occhipinti v. Department of Justice*, 61 M.S.P.R. 504 (1994). The question of mootness must also be a consideration in determining whether a stay request should be granted. A stay does not reverse, annul, undo, or suspend what has already been done. *See* BLACK'S LAW DICTIONARY 1413 (6th Ed. 1990).

³ The appellant is free, however, to refile the stay request in compliance with the Board's regulations. If so, the agency has five business days after the service of the stay request to file a response. 5 C.F.R. § 1209.9(c).

The parties are advised that this decision only involves the appellant's stay request and not his constructive removal/involuntary retirement. A party seeking review of this order must move for certification of an interlocutory appeal under 5 C.F.R. §§ 1201.91-.93.

For these reasons, the appellant's stay request is **DISMISSED**.

FOR THE BOARD:

/S/

Joshua Henline
Administrative Judge