

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-31-02

DEBRA E. FERY,)
)
 Appellant,)
)
 v.)
)
 STATE OF OREGON, DEPARTMENT)
 OF ADMINISTRATIVE SERVICES,)
 INFORMATION RESOURCE)
 MANAGEMENT DIVISION,)
 GENERAL GOVERNMENT)
 DATA CENTER,)
)
 Respondent.)
 _____)

ORDER ON RECONSIDERATION

On October 31, 2005, this Board found that the Department of Administrative Services (DAS or State) terminated Ms. Fery for disciplinary reasons and ordered her reinstatement. The State filed a petition for judicial review with the Court of Appeals. While that appeal was pending, the parties reached an agreement that settled this matter and other litigation then pending in circuit court arising out of the same events. As part of that settlement, the parties agreed that they would seek to vacate this Board's decision.

On January 22, 2007, the State filed with this Board its motion to vacate our order.¹ It attached to its motion an order of the Court of Appeals, dated August 16, 2006, which gave this Board the opportunity to do so; and, thereafter, if we so chose, to enter an order implementing the parties' settlement. On January 30, 2007, this Board

¹Fery joins in the State's motion.

withdrew its order in this case to reconsider whether to vacate our order. For reasons set forth below, we deny the State's motion.

The State's argument in support of vacatur is admirably succinct:

"DAS believes that the board's decision is factually and legally flawed. Nonetheless, for a variety of reasons, DAS determined that a settlement was in the state's interest. In the settlement, DAS did not concede that Ms Fery's termination was unlawful; however, the settlement has obviously mooted the DAS's appeal on that issue. However, in fairness, the state ought not to be required to acquiesce in this board's decision. See *Portland GE v. IBEW*, 209 Or App 77, 80, --- P3d --- (2006). The state therefore seeks to have that decision vacated, and the legal issues it raised left for another day." Motion at p. 2.

According to the State, vacatur is appropriate when a party, as a matter of equity, should not be forced to accept a result after a case has become moot. The State concedes that it would not be appropriate for this Board to vacate our decision merely because a settlement has occurred. Nevertheless, the State argues that "unique circumstances" are present here, to wit: this Board based its decision on a legal theory which the State argues is incorrect. In support of its contentions, the State relies on *City of Eugene v. PERB*, 341 Or 120, 127, 137 P3d 1288 (2006).

We agree with the State's first position: vacatur is not appropriate merely because the State has entered into a settlement agreement. We also agree that *Eugene* is controlling. However, we conclude that the State has failed to meet the standards for vacatur established there. According to the Supreme Court,

"From the beginning we have disposed of moot cases in the manner "most consonant to justice" * * * in view of the nature and character of the conditions which have caused the case to become moot.' The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action.

** * * A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in

the judgment. The same is true when mootness results from unilateral action of the party who prevailed below. Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice.” (Citation omitted) 341 Or at 126.

As the Court went on to state: “Instead, *Kerr* established that vacatur is an extraordinary remedy to which a party must show an equitable entitlement. * * * As the text from *Kerr* quoted above makes clear, in deciding whether to vacate a judgment that has become moot, a significant factor in that consideration is whether the party seeking vacatur contributed to the events that mooted the underlying controversy.” In *Eugene*, the party seeking vacatur was “frustrated by the vagaries of circumstance,” and hence vacatur was appropriate. *Id.*

Vacatur is not appropriate here. It is an extraordinary remedy to which a party must show equitable entitlement. There are no unique circumstances which require vacatur, as the State claims. Any claim that this case is moot derives from the settlement agreement the State reached with Ms. Fery. When the State voluntarily entered into that agreement, it thereby surrendered its claim to the equitable remedy of vacatur. Our order is therefore “not unreviewable, but simply unreviewed” by the State’s own choice.


ORDER

We grant reconsideration, and deny the State’s motion for vacatur.

DATED this 8th day of March 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member