

FILED: April 04, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JAMES C. WALLACE,
Petitioner,

v.

STATE *ex rel* PUBLIC EMPLOYEES RETIREMENT SYSTEM,
and the PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD,
Respondents.

Public Employees Retirement Board
060979

A144617

Argued and submitted on April 20, 2011.

James C. Wallace argued the cause and filed the briefs *pro se*.

Leigh A. Salmon, Assistant Attorney General, argued the cause for respondents. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Ortega, Presiding Judge, and Brewer, Judge, and Sercombe, Judge.*

SERCOMBE, J.

Petition for judicial review dismissed as moot.

*Brewer, J., *vice* Rosenblum, S. J.

1 SERCOMBE, J.

2 Petitioner seeks review of a final order of the Public Employees Retirement
3 Board (board) that granted summary determination in favor of the Public Employees
4 Retirement System (PERS) and dismissed his previously granted request for a contested
5 case hearing. The board concluded that petitioner's challenge to individual restrictions on
6 his trading activities in the Oregon Savings Growth Plan (plan) was moot. On review,
7 petitioner contends that the board erred in failing to provide him the "rights of a party to a
8 contested case hearing" and in dismissing his request for a contested case hearing as
9 moot. For the reasons discussed below, we conclude that petitioner's assignments of
10 error are moot and dismiss the petition for judicial review.

11 We take the facts from the unchallenged findings in the board's order,
12 supplemented by additional evidence in the record.¹ *See Meltebeke v. Bureau of Labor*
13 *and Industries*, 322 Or 132, 134, 903 P2d 351 (1995) (holding that "unchallenged
14 findings of fact are the facts for purposes of judicial review of an administrative agency's
15 final order"). Petitioner has been a participant in the plan since at least 1983. In 2002,
16 the plan began imposing trading restrictions on plan participants that had "made more
17 than two trades per month in a three-month consecutive period" in the International Stock
18 investment option (IS option). In March 2002, the plan's deferred compensation manager
19 (manager) determined that petitioner was engaged in excessive trading and, accordingly,

¹ Petitioner does not assign as error the accuracy or completeness of the board's findings of fact.

1 limited petitioner to one redemption per month from the IS option. In December 2004,
2 the board adopted a policy (2004 policy) giving the manager

3 "the authority to implement reasonable trading restrictions in the [plan] as
4 needed to prevent increases in administrative costs or fees; negative
5 investment performance; or detrimental effects that would arise or be
6 imposed on the [p]lan as a whole or members in general because of
7 excessive member trading."

8 Pursuant to that policy, in 2005 and 2006, the manager imposed a series of further
9 restrictions on petitioner's ability to trade in the plan.

10 On March 14, 2006, the manager imposed a final set of individual
11 restrictions on petitioner's trading activities. In May 2006, petitioner requested that the
12 PERS director review the manager's imposition of those restrictions as a staff
13 determination pursuant to OAR 459-001-0030 (Jan 1, 2002), which provides for PERS
14 director review of a staff action or determination.² In a June 2006 letter to petitioner, the
15 PERS director affirmed the staff determination, finding that the manager had
16 appropriately exercised her authority under the 2004 policy to impose the restrictions:

17 "I am responding to your request that PERS lift the trading
18 restrictions placed on your Oregon Savings Growth Plan (OSGP) account
19 by the Deferred Compensation Manager. Your May 11, 2006 letter, which
20 was received on May 15, 2006, was referred to me.

21 "DETERMINATION

22 "The PERS' Board has given the Deferred Compensation Manager
23 authority to implement reasonable trading restrictions in the OSGP as
24 needed to prevent increases in administrative costs or fees, negative

² All citations to OAR 459-001-0030 reference the version that was in effect at the time petitioner requested that the PERS director review the manager's imposition of trading restrictions. That version became effective on January 1, 2002.

1 investment performance or other detrimental effects that would arise or be
2 imposed on the Plan as a whole or members in general because of excessive
3 member trading. Because it was reported that your trading activity
4 exceeded normal and expected frequency and dollar amounts, the Deferred
5 Compensation Manager exercised her authority to impose restrictions on
6 your trading activity. Therefore, I must deny your request."

7 Petitioner then requested a contested case hearing pursuant to OAR 459-
8 001-0035 (June 26, 2006).³ In his August 9, 2006, letter requesting that hearing,

³ All citations to OAR 459-001-0035 reference the version that was in effect at the time that petitioner requested a contested case hearing. That version became effective on June 26, 2006. OAR 459-001-0035 provides, in relevant part:

"(1) Request for a contested case hearing. To obtain review of any determination by the Director, for which a contested case hearing has not been held, the party shall file with the Board a petition for a contested case hearing. * * *

* * * * *

"(3) Criteria for Request. The petition for a contested case hearing shall be in writing and set forth:

"(a) A description of the determination for which review is requested;

"(b) A short statement of the manner in which the determination is alleged to be in error;

"(c) A statement of facts that are the basis of the petition;

"(d) Reference to applicable statutes, rules or court decisions upon which the petitioner relies;

"(e) A statement of the action the petition seeks; and

"(f) A request for a hearing.

"(4) Contested Case Hearing. The Board shall acknowledge receipt of a petition for a contested case hearing within 15 days of filing.

1 petitioner requested that

2 "the Decision [by the director] be reversed because the Manager did not
3 have authority to impose the restrictions upheld in the Decision and the
4 imposition of those restrictions violate the terms of my Contract and my
5 constitutional rights. If that request is denied, I request that the restrictions
6 in the Decision be changed to those in proposed OAR 459-050-0037, or
7 those restrictions contained in the final rule, if they are less restrictive than
8 those in the proposed rule."

9 In a letter dated August 11, 2006, PERS acknowledged "receipt of [petitioner's] August 9,
10 2006[,] letter requesting a contested case hearing" and granted that request. Later that
11 month, PERS referred the case to an administrative law judge (ALJ).

12 In January 2007, while the contested case was pending, the PERS board
13 adopted OAR 459-050-0037 (May 1, 2007), which imposed trading restrictions on all
14 participants in the plan, including petitioner, and granted the manager the authority to
15 establish additional temporary restrictions. On April 11, 2007, the manager informed
16 petitioner by letter that, "[o]nce the new restrictions [in OAR 459-050-0037] are in place,
17 all current restrictions on your account will be removed and the new restrictions will
18 apply." OAR 459-050-0037 became effective on May 1, 2007. On that date, the
19 manager removed the individual restrictions on petitioner's account. Shortly thereafter,
20 PERS moved for summary determination and dismissal of petitioner's request for a
21 contested case hearing. PERS asserted that "the issues posed by petitioner [were]

"(5) The Director, or an administrator appointed by the Director, may direct the staff to schedule a formal contested case hearing or develop a recommendation to deny the member's request to be presented to the Board. The Board may then deny a request for a hearing when it has decided, in consultation with legal counsel, that the Board has no authority to grant the relief requested."

1 rendered moot" because petitioner had already received the relief that he had requested in
2 his request for a contested case hearing--removal of the individual restrictions--and no
3 further relief was available to him in the contested case forum.

4 In response, petitioner agreed that "some of [his] original arguments may be
5 moot."⁴ However, petitioner argued that he had originally requested "to have the former
6 restrictions rescinded," and that that relief had not been provided. He also argued that his
7 alternative request for relief--that the individual restrictions be changed to conform to
8 those reflected in the proposed version of OAR 459-050-0037 or the final version of that
9 rule, whichever was least restrictive--had not been provided because he was subject to the
10 more restrictive final rule. Additionally, he raised new claims for the recovery of
11 damages, declaratory relief, and an award of costs and fees.

12 The board, which affirmed and adopted the proposed order issued by the
13 ALJ, granted summary determination and dismissed petitioner's request for a contested
14 case hearing, concluding, in part, that "PERS's implementation of rules restricting trading
15 within the plan renders moot [petitioner's] challenge to the previous individual
16 restrictions placed on his account."⁵ The board explained:

⁴ Petitioner did not specifically identify which arguments he believed may have been rendered "moot."

⁵ After the ALJ issued the proposed order, but before the board issued its final order, petitioner filed a complaint in circuit court asserting several claims related to the manager's imposition of individual restrictions on his trading activities. Because petitioner's contested case proceeding was still in progress at the time he filed his complaint, the court concluded that it lacked subject matter jurisdiction over those claims and dismissed the complaint with prejudice. Petitioner appealed, and we reversed,

1 "When PERS referred this case to the Office of Administrative
2 Hearings, the issue was whether the manager of the Plan had improperly
3 imposed individualized trading restrictions on [petitioner's] ability to trade
4 among various investment options in the Plan. The agency granted
5 [petitioner's] request for a contested case hearing in that matter.

6 * * * * *

7 "The decision to impose trading restrictions on [petitioner] was a
8 determination made by the deferred compensation manager, and, as such,
9 was a staff determination. Arguably, this matter could have been the
10 subject of a contested case hearing.

11 "But, in the meantime, the situation changed. The manager no
12 longer places individualized restrictions on a member's ability to trade. The
13 agency adopted OAR 459-050-0037, which imposes trading restrictions on
14 Plan participants in general.

15 "An over-arching principle of law is that when a matter is moot,
16 there is no longer an issue to be entertained. One of the definitions of
17 'moot' in Webster's Third New International Dictionary (Unabridged) is, 'to
18 deprive of practical significance.' In *Brunnett v. PSRB*, 315 Or 402[, 848
19 P2d 1194] (1992), the Court found that where a patient had been discharged
20 from the jurisdiction of PSRB, the possibility that the state might try to
21 recover the costs of the patient's care at some future point was too
22 speculative. A determination by the agency would therefore have no
23 practical effect. Here, a determination [regarding] the individual
24 restrictions on [petitioner's] ability to trade within the Plan would have no
25 practical effect, because individualized restrictions no longer exist.

26 "[Petitioner] argued that the issues are not moot because he must
27 exhaust his administrative remedies, including asking for a declaratory
28 judgment to get a ruling about the validity of the restrictions placed on him
29 individually. If an issue is moot, jurisdiction is not continued merely
30 because a determination might be relevant in a future tort action. [Keeney v.](#)
31 [University of Oregon](#), 178 Or App [198, 36 P3d 982] (2001), *rev den*, 334
32 Or 327 (2002). The contested case proceeding of the APA is not meant for
33 the purpose of giving advisory opinions. * * *

concluding that the court erred in dismissing, instead of abating, those claims on which petitioner had requested compensatory relief. [Wallace v. State ex rel PERB](#), 245 Or App 16, 263 P3d 1020 (2011).

1 "[We] hold that petitioner's claim that there was no authority for the
2 manager to place individual restrictions on his ability to trade among the
3 investment options was rendered moot by the adoption and implementation
4 of the general restrictions in OAR 459-050-0037."

5 On review, petitioner raises two assignments of error. First, he contends
6 that the board erred in failing to provide him the procedural "rights of a party to a
7 contested case hearing," including proper notice, discovery, and an evidentiary hearing.
8 Second, he contends that the board erred in dismissing his request for a contested case
9 hearing as moot. Specifically, petitioner argues that the concept of mootness, as a
10 component of justiciability, does not apply to administrative agencies and, therefore, that
11 the board erred by relying on it. Petitioner further argues that a contested case hearing
12 already existed by definition and that, in any event, his "claims for damages, declaratory
13 relief, costs, and attorney fees under state and federal law and constitutional provisions
14 did not become moot." Petitioner seeks a remand to the board with instructions to
15 provide him the "notices and other rights of a party to a contested case hearing prior to
16 considering a motion to dismiss or the merits of [his] claims."

17 As to petitioner's first assignment of error, the board responds that it
18 "provided petitioner all of the notices and rights required under its own rules and under
19 the [Administrative Procedures Act]." As to petitioner's second assignment, the board
20 concedes that the concept of mootness does not apply to administrative agencies. *See*
21 [*Thunderbird Hotels, LLC v. City of Portland*](#), 218 Or App 548, 556, 180 P3d 87 (2008)
22 ("'[M]ootness' is a term of art concerning the authority of the courts to exercise the
23 judicial power conferred by Article VII (Amended) of the Oregon Constitution and * * * ,

1 as an aspect of justiciability, it applies only to the courts and not to local governments or
2 administrative agencies."). However, the board argues that that particular argument is
3 unpreserved. Further, the board argues that it properly "exercised its discretion not to
4 proceed with a full contested case hearing because petitioner had already received all of
5 the relief the Board could lawfully grant him in the contested case forum--namely,
6 removal of the individual trading restrictions."

7 We conclude that the review proceeding before this court is moot. *See*
8 [Cyrus v. Board of County Commissioners](#), 226 Or App 1, 5, 202 P3d 274 (2009) ("This
9 court has an independent obligation to determine whether a case is justiciable, and
10 mootness is part of that inquiry." (Citation and internal quotation marks omitted.)). As
11 we explained in [Starrett v. City of Portland](#), 196 Or App 534, 538, 102 P3d 728 (2004):

12 "Under traditional principles, a case is justiciable if the parties have adverse
13 interests and the court's decision in the matter will 'have some practical
14 effect on the rights of the parties to the controversy.' *Brumnett v. PSRB*,
15 315 Or 402, 405, 848 P2d 1194 (1993). The requirement that the court's
16 decision have a practical effect on the party invoking the court's jurisdiction
17 must remain satisfied throughout the litigation. [Utsey v. Coos County](#), 176
18 Or App 524, 540, 32 P3d 933 (2001), *rev dismissed*, 335 Or 217 (2003).
19 Thus, a case that is 'otherwise justiciable, but in which a court's decision no
20 longer will have a practical effect on or concerning the rights of the parties,
21 will be dismissed as moot.' *Brumnett*, 315 Or at 406."

22 In this case, the relief available to petitioner on review is a remand to the
23 board. Petitioner acknowledges that the manager has removed the individual restrictions
24 from his account, but suggests that, on remand, the board could additionally provide him

1 with declaratory and compensatory relief.⁶ Accordingly, in order to determine whether
2 exercising judicial review will have a practical effect on petitioner, we must first
3 determine whether, on remand, the board could provide petitioner additional relief.

4 As explained, petitioner sought review of the director's determination
5 denying his request that the individual restrictions be removed from his account.

6 Petitioner did so by filing a petition for a contested case hearing pursuant to OAR 459-
7 001-0035. That rule requires that a petition for a contested case hearing address certain
8 enumerated criteria. Specifically, OAR 459-001-0035(3) requires that a petition include,
9 among other things, a "statement of the action the petition seeks." Following receipt of a
10 petition, PERS may grant or deny the request for a contested case hearing.⁷ OAR 459-
11 001-0035(5). It necessarily follows, then, that the scope of a contested case hearing--
12 including the relief available--is limited to that specified in the initial petition.

13 In his petition for a contested case hearing, petitioner requested that "the
14 Decision [by the director] be reversed." That, in effect, was a request that the board
15 remove the individual restrictions from his account. Because those individual restrictions
16 have since been removed by the manager, petitioner has obtained the relief that he
17 requested in his petition for a contested case hearing. On remand, even if the board were

⁶ In *Wallace*, however, we concluded that petitioner could not recover compensatory damages through his contested case proceeding. 245 Or App at 29-30.

⁷ Specifically, the board may deny a request for a contested case hearing when it has decided, after consulting with legal counsel, that it lacks the authority to grant the relief requested. OAR 459-001-0035(5).

1 to agree with petitioner's contentions that the individual restrictions were improperly
2 imposed, the board could not provide him additional relief. Accordingly, no practical
3 effect would result from a determination by this court regarding whether the board erred
4 in failing to address the merits of petitioner's claims or in failing to provide petitioner
5 certain rights associated with a contested case hearing. *See, e.g., Thunderbird Hotels,*
6 *LLC*, 218 Or App 548 (concluding, in part, that no practical effect would result from a
7 determination by this court of whether the Land Use Board of Appeals, which had
8 invalidated an expired city ordinance, erred in failing to address a party's alternative
9 arguments supporting the invalidity of the ordinance).

10 Petition for judicial review dismissed as moot.