

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re Donohoe

311 F. App'x 357 (Fed. Cir. 2008) · Decided June 26, 2008

SUMMARY

The Federal Circuit dismissed Philip D. Donohoe’s petition for a writ of mandamus seeking to prevent the Merit Systems Protection Board from issuing remand orders under *Butterbaugh v. Department of Justice*. The court held that the All Writs Act did not authorize mandamus because Donohoe had not initiated a proceeding before the Board and the requested relief was based only on prospective jurisdiction. All other requests for relief were denied.

CASE DETAILS

COURT	United States Court of Appeals for the Federal Circuit
WRITING FOR THE COURT	Per curiam; Lourie; Michel; Newman
JURISDICTION	Federal
DECIDED	June 26, 2008
DISPOSITION	dismissed
PROCEDURAL POSTURE	Philip D. Donohoe petitioned the Federal Circuit for a writ of mandamus directing the Merit Systems Protection Board to cease issuing remand orders under <i>Butterbaugh v. Department of Justice</i> and also sought declaratory and other relief.
STANDARD OF REVIEW	The court examined de novo whether it possessed jurisdiction to issue the requested extraordinary writ.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Philip D. Donohoe v. Merit Systems Protection Board

TOPICS

- appellate jurisdiction
- appellate procedure
- judicial review of agency action
- federal employment law
- military law

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the Federal Circuit had jurisdiction under the All Writs Act to issue a writ of mandamus concerning prospective Merit Systems Protection Board proceedings when the petitioner had not initiated or participated in a Board proceeding.
2. Whether Donohoe was entitled to declaratory or other relief challenging the Board's issuance of remand orders under Butterbaugh.

HOLDINGS

1. The All Writs Act does not itself confer jurisdiction and cannot authorize the Federal Circuit to issue mandamus in aid of merely prospective jurisdiction. Because Donohoe had not initiated a proceeding before the Board and was not seeking review of a final Board order or decision, the court lacked authority to issue the requested writ.
2. Donohoe was not entitled to declaratory or other relief because his petition did not present a justiciable dispute within the court's jurisdiction.

KEY QUOTATIONS

“While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process ‘in aid of the issuing court’s jurisdiction ... [T]he Act does not enlarge that jurisdiction.’” (at 358)

“It is one thing to say that we have such authority when, in the formulation used by the Supreme Court, a case is “within [our] appellate jurisdiction although no appeal has been perfected.”” (at 359)

FACTUAL BACKGROUND

Donohoe appeared to be a civilian Department of the Air Force employee and a member of the Armed Forces Reserve components. He did not identify any particular Merit Systems Protection Board case involving him. Instead, he challenged the Board's use of remand orders under Butterbaugh in cases involving other employees and argued that the underlying government practice lacked the required discriminatory motivation.

PROCEDURAL HISTORY

Donohoe had not sought relief from the Merit Systems Protection Board and had not initiated any Board proceeding before petitioning the Federal Circuit. He challenged the Board's purported practice in cases involving other employees, rather than seeking review of a final Board order or decision in his own case.

DISPOSITION

dismissed

CASES CITED

- Butterbaugh v. Department of Justice, 836 F.3d 1332 (Fed. Cir. 2003)
- Butterbaugh v. Department of Justice, 101 M.S.P.R. 202, 203 (2004)
- Clinton v. Goldsmith, 526 U.S. 529, 534-35, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999)
- Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)
- In re Tennant, 359 F.3d 523, 529 (D.C. Cir. 2004)

OPINION

PER CURIAM.

PER CURIAM. ORDER Philip D. Donohoe petitions for a writ of mandamus directing the Merit Systems Protection Board to stop issuing remand orders under *Butterbaugh v. Department of Justice*, 836 F.3d 1332 (Fed.Cir.2003) and for “declaratory relief.” Donohoe also submits a “Notice of Respondent Counsel’s Conflict of Interest” and a “request for relief.” Under 5 U.S.C. § 6323(a)(1), federal government employees who are members of the Armed Forces Reserve components are entitled to 15 days of annual military leave “without loss in pay, time, or performance or efficiency rating for active duty [or] inactive-duty training.” In *Butterbaugh*, we held that the practice of charging military reservists leave on days they were not scheduled to work was contrary to section 6326 and constituted the denial of a benefit of employment in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301M333.

We remanded the matter for further proceedings. On remand, the Board in *Butterbaugh* ordered the government to correct its records to reflect that no military leave was charged for any improper days. See *Butterbaugh v. Department of Justice*, 101 M.S.P.R. 202, 203 (2004). It appears that Donohoe is a civilian employee of the Department of the Air Force. He does not state that he has a case before the Board and does not identify any particular case.

Nevertheless, Donohoe petitions this court to issue a writ of mandamus to stop what he considers the flawed practice of *Butterbaugh* remands involving other employees. Essentially, Donohoe contends that our decision in *Butterbaugh* wrongfully assumed that the government’s practices were motivated by the employee’s military status or performance. He further contends that because there is no requisite finding of improper motivation, this court should direct the Board to stop issuing remand orders under *Butterbaugh* in cases involving other employees.

We must first address the threshold question of whether we have jurisdiction to grant the requested relief. The All Writs Act provides that the federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

As this statutory language makes clear, the Act is not itself a grant of jurisdiction. “While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process ‘in aid of the issuing court’s jurisdiction... [T]he Act does not enlarge that jurisdiction.” *Clinton v. Goldsmith*, 526 U.S. 529, 534-35, 119 S.Ct. 1538, 143 L.Ed.2d 720 (1999).

Donohoe’s grievance is aimed at the Merit Systems Protection Board, and this court has exclusive jurisdiction to review final orders and decisions from that forum. See 28 U.S.C. § 1295(a)(9). However, our review of the Board under the All Writs Act must be done within proper constitutional and prudential limitations. Article III of the Constitution requires that petitioners seeking relief under the All Writs Act demonstrate that federal judicial power is being properly exercised over actual “cases” or “controversies.” *Allen v. Wright*, 468 U.S. 737, 104 S.Ct.

3315, 82 L.Ed.2d 556 (1984). Donohoe did not seek remedy from the Board or initiate any proceeding at the Board before seeking relief from this court. Thus, we do not have authority under the All Writs Act to issue a writ of mandamus “in aid of’ prospective jurisdiction. See *In re Tennant*, 359 F.3d 523, 529 *359(D.C.Cir.2004) (“It is one thing to say that we have such authority when, in the formulation used by the Supreme Court, a case is “within [our] appellate jurisdiction although no appeal has been perfected.’ [citation omitted].

It is quite another to claim such power solely on the basis that events might lead to a filing before an agency or lower court, which might lead to an appeal to this court.”). Accordingly, IT IS ORDERED THAT: (1) The petition for a writ of mandamus is dismissed.

(2) All other requests for relief are denied.