

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAYTON E. NABORS,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
PH07528610198

DATE: OCT 23 1986

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant petitions for review of an initial decision, issued April 10, 1986, that dismissed his petition for appeal. For the reasons below, the Board GRANTS appellant's petition for review. 5 U.S.C. § 7701(e). The initial decision is AFFIRMED as MODIFIED.

BACKGROUND

The agency removed appellant, a Distribution Clerk at the Charleston, West Virginia, Main Post Office, for dishonest conduct. The agency's decision letter stated that the removal would be effective June 7, 1985. Appellant filed a grievance with the agency and a petition for appeal with the Board's Philadelphia Regional Office. On July 3, 1985, however, the regional office dismissed appellant's appeal after appellant withdrew it. Appellant pursued his appeal through the grievance process. He was removed from the agency rolls on

September 13, 1985, after he failed to accept a pre-arbitration settlement offer to convert the removal to a voluntary resignation. Appellant then filed a discrimination complaint with the agency. In a letter dated December 9, 1985, the Regional Postmaster General dismissed the complaint as untimely and informed appellant that he could appeal to the Board. Appellant again petitioned the regional office for appeal on December 26, 1985.

The administrative judge¹ dismissed appellant's petition as not within the Board's appellate jurisdiction. The administrative judge found that: 1) arguably, the issue of whether the Board lacked jurisdiction over the appeal under the principle of res judicata was conclusively decided against appellant because the regional office had dismissed appellant's original petition for appeal after he withdrew it; and 2) in any event, 5 U.S.C. § 7121 precluded appellant from appealing to the Board because he had elected to challenge his removal through the grievance procedure. The administrative judge also found that the appeal was untimely because appellant did not file it until December 26, 1985. He noted that the fact that the agency's dismissal of the subsequent discrimination complaint by appellant as untimely advised him of an appeal right to the Board did not give the Board jurisdiction absent an otherwise appealable action.

ISSUES

1. Did appellant's decision to grieve his removal preclude him from filing an appeal with the Board?
2. Did appellant establish good cause for waiving the filing deadline for his petition for appeal?

¹ Effective May 8, 1986, the Board changed the working title of its regional office attorney-examiners from presiding official to administrative judge.

ANALYSIS

The administrative judge erred in finding that appellant's prior grievance precluded his appeal to the Board.

Appellant asserts that the administrative judge erred in finding that under 5 U.S.C. § 7121 appellant could not appeal to the Board after electing to challenge his removal through the grievance procedure. We agree. The Board has held that the election requirements of 5 U.S.C. § 7121 do not apply to the Postal Service and therefore that preference eligible employees of the Postal Service have the right to both appeal an adverse action to the Board and invoke grievance procedures of the collective bargaining agreement. *Jones v. United States Postal Service*, 31 M.S.P.R. 130, 131 (1986); *Hall v. United States Postal Service*, 26 M.S.P.R. 233, 236 (1985).

Appellant has not established good cause for the untimely filing of his petition for appeal.

The Board has determined that it is generally appropriate to treat requests for reconsideration of appellant-initiated dismissals of petitions for appeal as late-filed petitions for appeal and to determine whether good cause has been established for waiving the filing deadline. *Duncan v. United States Postal Service*, 29 M.S.P.R. 72, 74 (1985), *aff'd*, 795 F.2d 1000 (Fed. Cir. 1986). We find that the same analysis

applies here where appellant has filed a second petition for appeal after withdrawing his first one.²

We find that appellant's petition for appeal must be dismissed because it was not submitted within the time limits set forth in 51 Fed. Reg. 25,150 (1986) (to be codified in 5 C.F.R. § 1201.22(b))³ and appellant has not shown good cause for waiving these time limits. Appellant's petition was filed more than six months after the effective date of his removal.⁴ Appellant asserts that he withdrew the appeal because he did not have the information or representation he needed to proceed. These reasons do not constitute good cause for waiving the filing deadline. See, e.g., *Tolton v. Office of Personnel Management*, 14 M.S.P.R. 127, 128 (1982); *Thomas v. United States Postal Service*, 3 M.S.P.R. 486, 487 (1980); *Trask v. Federal Aviation Administration*, 2 M.S.P.R. 208, 210 (1980).

² For this reason, we find it unnecessary to consider the administrative judge's discussion concerning the possible applicability of res judicata. We note, however, that the administrative judge appears to have erred in finding that the initial decision on the original appeal was "conclusive as to appellant's right to appeal his removal" under the principle of res judicata. Initial Decision at 3. That decision was not on the merits of his claim; it simply dismissed the appeal solely because appellant withdrew the appeal. It did not purport to decide any issue regarding Board jurisdiction or appellant's appeal right. Cf. *Dick v. Office of Personnel Management*, 20 M.S.P.R. 566, 568 (1984) (matters presented were identical to matters previously adjudicated by three levels of prior Civil Service Commission and then litigated up to the Supreme Court).

³ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

⁴ The Board views the removal of an employee covered by the Postal Service's collective bargaining agreement as being constructively effective on the effective date contained in the agency's decision letter. *Benjamin v. United States Postal Service*, 29 M.S.P.R. 555, 557 (1986). Therefore, appellant was removed on June 7, 1986.

Appellant apparently contends that his petition for appeal should have been accepted as a timely filed "mixed case" under 5 C.F.R. § 1201.154(a)(1) because he filed it within twenty days of receiving the agency's decision on his discrimination complaint. Appellant's contention is without merit. This regulation applies to discrimination complaints that were timely filed with the agency. 5 C.F.R. § 1201.154(a). Here, the agency dismissed appellant's complaint as untimely. Therefore, appellant had appeal rights to the Equal Employment Opportunity Commission, not the Board. 5 C.F.R. § 1613.215. As the administrative judge noted, the agency's erroneous advice to appellant concerning his rights does not give the Board jurisdiction over his appeal.

Therefore, we find the administrative judge correctly dismissed appellant's petition for appeal because appellant failed to show good cause for its untimeliness.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal, if the court has jurisdiction. 5 U.S.C. § 7703. The

address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than 30 days after you or your representative receives this order.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.