



In a decision issued February 20, 1985, the presiding official found he had no authority to consider appellant's request to reopen his appeal. Appellant has now petitioned for review of this determination. For the reasons set forth below, the petition is DENIED.

The issues before us are whether the Board can exercise jurisdiction in a matter which the appellant has taken to arbitration, and if so, whether the appellant has established a basis for reopening and reinstating his prior appeal. The agency's contention that appellant cannot appeal to the Board because he elected to utilize the grievance arbitration procedure has previously been rejected by the Board.<sup>2/</sup>

In Hall v. United States Postal Service, 26 M.S.P.R. 233 (1985), the Board found that 5 U.S.C. § 7121, which requires that an employee elect between a statutory appeal process and a negotiated grievance procedure, does not apply to the Postal Service. In addition, the Board found that a Postal Service preference eligible is entitled by statute and regulation to appeal to the Merit Systems Protection Board and that this right cannot be limited by the collective bargaining agreement.

Because the Board is not precluded from exercising jurisdiction over appellant's appeal, we must now determine whether the appellant has established a basis for the Board to do so.

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<sup>2/</sup> Higgs v. United States Postal Service, 12 MSPB 315 (1982), which the agency cites as support for this position was reversed by the Board in Hall v. United States Postal Service, 26 M.S.P.R. 233 (1985).

In this regard, we find that appellant may proceed before the Board either by filing a new appeal or by establishing a basis for the Board to reopen its prior order dismissing his first appeal.

The Board finds, given presiding officials' limited scope of authority, 5 C.F.R. 1201.112, that it is generally appropriate to treat requests for reconsideration of appellant-initiated dismissals 3/ as late-filed petitions for appeal and to determine whether good cause has been established for waiver of the filing deadline. In this case, however, because the presiding official examined the appeal only to determine if he had the authority to reopen it, we will address both possible sources of Board jurisdiction. We note that the same factors which bear on the propriety of reopening the first appeal will generally be relevant to a determination of whether to allow the late filing of the second. However, reviewing such cases as new appeals will allow presiding officials, in the first instance, to consider appellants' arguments.

Appellant's second filing with the Board, if treated as a new appeal, must be dismissed for failure to comply with the time limits, 5 C.F.R. 1201.22(b), since it was filed after the deadline for filing an appeal with the Board and appellant has failed to establish good cause for waiver of the Board's filing deadline. See Clark v. Department of the Treasury, 8 MSPB 409 (1981). Appellant's pleading

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3/ This decision does not address directly the situation where an appeal is dismissed without prejudice because of the appellant's inability to prosecute it and the presiding official sets forth a specific event or time which will trigger appellant's obligation to re-file the appeal.

was filed more than five months after the effective date of his removal. The Court of Appeals for the Federal Circuit has expressly held that pursuit of a grievance in another forum does not constitute good cause for the waiver of Board time limits. Massingale v. Merit Systems Protection Board, 736 F.2d 1521 (Fed. Cir. 1984). Therefore, as a "new appeal", appellant's appeal must be dismissed.

Viewing the appeal as a request to reopen appellant's original appeal, we find that the presiding official was correct in finding that he had no regulatory authority to reopen the case. See 5 C.F.R. § 1201.112, which divests the presiding official of jurisdiction after issuance of the initial decision except in certain limited circumstances which are not applicable here. In addition appellant's petition for review does not assert new and material evidence to warrant reversal of the presiding official's decision not to reopen.

While the Board does have authority on its own motion under 5 C.F.R. § 1201.117, to reopen and reconsider the presiding official's order dismissing appellant's appeal, we decline to do so in this case.

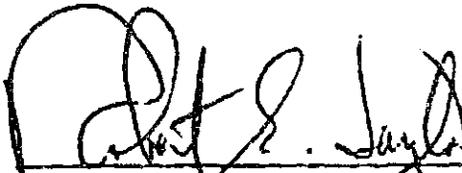
Appellant withdrew his appeal with the clear intention of proceeding under the negotiated grievance procedure. Appellant invoked arbitration and a full hearing was held. Appellant now asserts that the adverse arbitration decision was due to erroneous advice from his representative regarding the timing of his withdrawal of his appeal filed with this Board. However, in view of the fact that the arbitrator cited previous decisions regarding the effect of a Board appeal on the arbitrability of a grievance, appellant and his representative should have been on notice regarding the consequences of the respective appeals. Moreover, appellant does not assert or establish that the presiding official

erred in dismissing his first appeal pursuant to his request, or that the agency or the Board contributed to appellant's representative's error. See Link v. Wabash Railroad Company, 370 U.S. 626, 82 S. Ct. 1386, 1390 (1961) and Gildersleeve v. U.S. Postal Service, 4 MSPB 465 (1980). We find no basis for the Board to reopen.

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

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.