UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

91 M.S.P.R. 671

LORENZO A. MONTALVO,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
SF-0752-02-0188-I-1

DATE: July 16, 2002

Norman Wright, Los Angeles, California, for the appellant.

Patricia A. Perkins, Esquire, San Francisco, California, for the agency.

BEFORE

Susanne T. Marshall, Acting Chairman
Beth S. Slavet, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of an initial decision that dismissed the appeal of his removal as untimely filed. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication.

BACKGROUND

¶2 Effective April 16, 2001, the appellant was removed from his position as a PS-5 Motor Vehicle Operator. Initial Appeal File (IAF), Tab 1. He filed an appeal of the removal on December 19, 2001. *Id.* Because the appeal appeared

to have been untimely filed, the administrative judge issued an Acknowledgment Order which required the appellant to file evidence and argument showing that the appeal was timely filed or that good cause existed for the delay. IAF, Tab 2. The agency subsequently filed a Motion to Dismiss Appeal (Motion to Dismiss) on the grounds that the appeal was untimely filed. IAF, Tab 6. The appellant did not respond to either the Acknowledgment Order or the Motion to Dismiss. Subsequently, the administrative judge dismissed the appeal as untimely filed. Initial Decision (ID) at 4.

¶3 The appellant argues for the first time in his timely petition for review that his appeal was timely filed according to mixed case procedures. Petition for Review File (PFRF), Tab 1. In support of his allegation, the appellant has submitted the agency's final decision on his mixed case complaint, dated November 23, 2001, with the petition for review. *Id.* The agency has timely responded in opposition to the petition for review. PFRF, Tab 3.

ANALYSIS

¶4 An appeal of an agency decision must be filed no later than 30 days after the effective date of the action being appealed, or 30 days after the date of the receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). If an appellant fails to timely submit his appeal, it will be dismissed as untimely filed unless good reason for the delay is demonstrated. 5 C.F.R. § 1201.22(c). The appellant bears the burden of proof with regard to timeliness, which must be established by the preponderance of the evidence. *Peterson v. Department of Health and Human Services*, 50 M.S.P.R. 237, 242 (1991), *aff'd*, 976 F.2d 747 (Fed. Cir. 1992) (Table).

¶5 The procedures and filing times for mixed cases, however, are somewhat different. A mixed case arises "[w]hen an appellant has been subject to an action that is appealable to the Board, and he alleges that the action was effected, in whole or in part, because of discrimination on the basis of race, color, religion,

sex, national origin, handicap, or age." *Cloutier v. U.S. Postal Service*, 89 M.S.P.R. 411, ¶ 5 (2001). Under those circumstances, an appellant may initially file a mixed case equal employment opportunity (EEO) complaint with his employing agency, or a mixed case appeal with the Board, but not both, and whichever is filed first is deemed to be an election to proceed in that forum. *Id.* (citing 29 C.F.R. § 1614.302(b), (c)). When an appellant has first timely filed a formal complaint of discrimination with the agency, an appeal to the Board must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue. 5 C.F.R. § 1201.154(b)(1); *Cloutier*, 89 M.S.P.R. 411, ¶ 5. Alternatively, if the agency has not resolved the matter or issued its final decision within 120 days, the appellant may appeal the matter directly to the Board at any time thereafter. 5 C.F.R. § 1201.154(b)(2).

¶6 To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). It is within the administrative judge's discretion to determine whether an appellant has demonstrated good cause for an untimely filing, and ignoring an administrative judge's acknowledgment order to show good cause is grounds for dismissal. *Mendoza v. Merit Systems Protection Board*, 966 F.2d 650, 653 (Fed. Cir. 1992) (an appellant who ignores an order of the administrative judge does so at his peril; all litigants before the Board are obligated to respect the Board, its procedures, and the orders of the Board's judges); *Sledge v. Department of Justice*, 44 M.S.P.R. 455, 459, *aff'd*, 923 F.2d 870 (Fed. Cir. 1990) (Table), *cert. denied*, 502 U.S. 1099 (1992).

¶7 Here, the appellant filed his appeal 8 months after the effective date of his removal. IAF, Tab 1. Additionally, he failed to respond to the administrative judge's Acknowledgment Order to show good cause for the untimely filing of his appeal. He likewise failed to respond to the agency's Motion to Dismiss.

Ordinarily, these would be sufficient grounds for dismissal of the appeal. *Mendoza*, 966 F.2d at 653; *Sledge*, 44 M.S.P.R. at 459.

¶8 In this case, however, the appellant indicated on the Board's Appeal Form that he had filed a formal mixed case complaint with the agency. IAF, Tab 1. The United States Court of Appeals for the Federal Circuit has held that when mixed case provisions are implicated on the face of an appellant's Appeal Form, albeit ambiguously, the administrative judge should address the issue by asking both parties to submit evidence relevant to the timeliness of the appeal before dismissing it as untimely filed. *Whittington v. Merit Systems Protection Board*, 80 F.3d 471, 475 (Fed. Cir. 1996); *see Russell v. Department of the Treasury*, 82 M.S.P.R. 487, ¶ 1 (1999) (before dismissing an appeal as untimely, the administrative judge should inform the appellant of the date that he presumes triggered the running of the appeal period, and order both parties to produce whatever evidence they possess on timeliness). Because the record here indicates that this may be a mixed case, the administrative judge should have requested both parties to submit evidence regarding timeliness prior to dismissing the appeal.

¶9 While the Appeal Form indicates that the appellant filed a formal mixed case complaint, the appellant did not allege at any time below that the agency had issued its final decision on that complaint, which would have triggered the 30-day time limit in which to file an appeal with the Board. *See* 5 C.F.R. § 1201.154(b)(1). Instead, for the first time on petition for review, he argues that his appeal is a timely filed mixed case, and submits the final agency decision on his mixed case complaint, dated November 23, 2001. PFRF, Tab 1. Because the appeal was filed on December 19, 2001, which is within 30 days from the issuance of the agency's final decision, it appears to have been timely filed. *See* IAF, Tab 1; 5 C.F.R. § 1201.154(b)(1). The appellant did not submit the agency's final decision below, however, even though it predated the filing of the appeal. *See* IAF, Tab 1; PFRF, Tab 1.

¶10 The Board will not generally consider arguments raised or evidence submitted for the first time on petition for review absent a showing that they are based upon new and material evidence which was not previously available, despite the party's due diligence. *Timberlake v. U.S. Postal Service*, 76 M.S.P.R. 172, 175 (1997); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Because the agency's final decision on the appellant's mixed case complaint was not previously unavailable, and the appellant could have submitted it in response to the Acknowledgment Order below, it does not constitute new evidence of the nature that the Board normally would need to consider. *Avansino*, 3 M.S.P.R. at 214.

¶11 In this matter, however, the document in question reveals that the agency knew, or at least had evidence indicating, the appellant's case was timely filed. An agency may not sit by concealing evidence that would change the result in the case. *Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 646 (Fed. Cir. 1996). The United States Court of Appeals for the Federal Circuit and the Board have uniformly condemned such agency inaction as gamesmanship. *Id.*; *Williams v. Equal Employment Opportunity Commission*, 75 M.S.P.R. 144, 149 (1997). In the instant appeal, the agency compounded its failure to disclose evidence regarding timeliness, namely its own final decision on the appellant's mixed case complaint, by filing a motion to dismiss asserting that the appeal was untimely filed. IAF, Tab 6. Under similar circumstances, the Board has found it proper to remand the case for adjudication on the merits. *Williams*, 75 M.S.P.R. at 149. The Board finds that result equally appropriate in this case.

ORDER

¶12 For the foregoing reasons, the initial decision in this matter is VACATED, and this appeal is REMANDED to the Western Regional Office for adjudication on the merits.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.