UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

93 M.S.P.R. 151

DAN P. MOODY,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
CH-0752-02-0396-I-1

DATE: December 4, 2002

Michael L. Boylan, Esquire, Louisville, Kentucky, for the appellant.

Kara L. Svendsen, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for adjudication.

BACKGROUND

¶2 The appellant, a PS-4 Mail Processor, entered into a Last Chance Agreement (LCA) with the agency in 2001, after the agency proposed his dismissal for unsatisfactory attendance. Initial Appeal File (IAF), Tab 5, Subtab 4C. The agency removed the appellant effective February 23, 2002, for an

alleged violation of the LCA. The appellant filed this appeal fewer than 30 days later. He checked "yes" in response to the question on the appeal form: "Have you filed a **formal** discrimination complaint with your agency or any other agency concerning the matter which you are seeking to appeal?" IAF, Tab 1 (emphasis in original). The appellant indicated that he had filed the complaint on March 1, 2002, and that a decision had not been issued thereon. *Id*. The administrative judge (AJ) advised the appellant that the Board could not exercise jurisdiction over the appeal until the agency had issued a decision on his discrimination complaint or 120 days had passed. IAF, Tab 2 at 2. In response, the appellant asked simply that the appeal be heard, without explaining the status of the formal discrimination complaint. *Id.*, Tab 3. The agency, however, stated in its response to the appeal: "The appellant has not filed a formal complaint of discrimination concerning the matters contained in his MSPB Appeal." IAF, Tab 5, Subtab 3. The AJ dismissed the appeal for lack of jurisdiction, on the ground that the appellant had filed a formal complaint of discrimination concerning the matter appealed and 120 days had not passed. *Id.*, Tab 6.

ANALYSIS

¶3 When an appellant files a timely formal discrimination complaint with the agency prior to appealing to the Board, the right to pursue such appeal does not vest until the agency issues a final decision on the discrimination complaint, or 120 days have passed since the filing of the complaint. 5 C.F.R. § 1201.154(b); *see also Johnson v. U.S. Postal Service*, 76 M.S.P.R. 289, 291 (1997). If an appellant files with the Board prematurely under this subpart, the administrative judge will "dismiss the appeal without prejudice to its later refiling . . . ." 5 C.F.R. § 1201.154(c). Likewise, if the 120-day mark passes without a final decision by the agency while the appeal is awaiting consideration by the Board, the Board will consider such appeal to be ripe and remand it to the administrative judge for further proceedings. *Johnson*, 76 M.S.P.R. at 292. If, however, no

formal discrimination complaint has been filed with the agency, and the appellant files a timely appeal with the Board after the adverse action, the Board will consider the appeal.

¶4 Here, the appellant never filed a formal discrimination complaint with the agency, his attestation on the appeal form to the contrary. His appeal with the Board, which included a claim of discrimination, was timely filed. He corrects his faulty attestation in his petition for review, essentially presenting new evidence that reaffirms the Board's jurisdiction. Petition for Review File (PRF), Tab 1 (agency letter dated April 16, 2002, notifying appellant of opportunity to file "formal mixed case complaint"); *see* 5 C.F.R. § 1201.115(d)(1). Notably, in its response to the petition, the agency itself points out that no formal discrimination complaint was ever filed, just as it stated below. *See* IAF, Tab 5, Subtab 3; PRF, Tab 3.

¶5 The appellant's situation strongly resembles that in *Ishimatsu v. Department of the Interior*, 20 M.S.P.R. 569 (1984). In that case, the appellant failed to sign her formal complaint of discrimination filed with the agency, and thus such complaint was ineffective. However, the appellant's appeal with the regional office was timely filed, and the Board found jurisdiction. The Board further noted in *Ishimatsu* that the appeal would have been ripe even if the appellant had successfully filed a formal discrimination complaint, because 120 days had elapsed since the ineffective complaint had been submitted, and no agency decision had been issued. *Id.* at 570.

ORDER

¶6 Accordingly, we hereby VACATE the initial decision dated April 22, 2002, and REMAND this appeal to the Central Regional Office for adjudication.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.