UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD 2008 MSPB 131

Docket No. DC-0752-07-0913-I-1

Yvonne Fannette Howerton, Appellant,

v.

Department of the Army, Agency.

June 20, 2008

David B. Nolan, Esquire, Alexandria, Virginia, for the appellant.

Michele Parchman, Esquire, Fort Belvoir, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman Mary M. Rose, Vice Chairman

OPINION AND ORDER

The appellant has filed a petition for review (PFR) of the October 30, 2007 initial decision that dismissed her appeal for lack of jurisdiction. She has also filed a Motion to Accept Late Filed Petition for Review (motion). Pursuant to 5 C.F.R. § 1201.114(f), we DENY the motion and DISMISS the PFR as untimely filed with no showing of good cause for the delay.

BACKGROUND

The appellant was indefinitely suspended from her position as a Supervisory Contract Specialist, effective September 23, 2007, because she failed to meet a condition of her employment in that she was denied access to Sensitive

Compartmented Information (SCI) and a security clearance. Initial Appeal File (IAF), Tab 15, subtabs 4E, 4F. She timely filed an appeal. IAF, Tab 1. She subsequently amended her appeal and alleged, among other things, that her indefinite suspension was based on prohibited discrimination and whistleblowing. IAF, Tab 3 at 7.

 $\P 3$

On October 9, 2007, the agency filed a motion to dismiss, arguing that the Board did not have jurisdiction over the appeal because the appellant was not an "employee" under 5 U.S.C. § 7511(a)(1) or 39 U.S.C. § 1005(a)(4)(a)(ii). IAF, Tab 6 at 2-4. The administrative judge issued an order, directing the appellant to "file evidence and argument to prove that this action is within the Board's jurisdiction" within 10 calendar days. IAF, Tab 7. The appellant filed an opposition to the motion to dismiss, claiming that she was an employee because she served 2 years of continuous service and because an adverse action was taken against her by the agency (*i.e.*, an indefinite suspension). IAF, Tab 9 at 1.

 $\P 4$

On October 30, 2007, the administrative judge issued an initial decision, dismissing the appeal for lack of jurisdiction. IAF, Tab 17 at 3-4. The initial decision provided that it would become final on December 4, 2007, unless a PFR was filed by that date. *Id.* at 4. The appellant filed a PFR on January 8, 2008. Petition for Review File (PFRF), Tab 1. On the last page of the PFR, the appellant signed a form Motion to Accept Late Filed PFR, but the part of the form on which she was supposed to explain her delay was left blank. *Id.* at 12. The agency filed a response to the appellant's PFR at PFRF, Tab 3. The appellant subsequently filed a Request for Consolidation of IRA Cases/Appellants' Request for Certification by the Board of Class Action of Blacks/Appellant Carter's Response to Order of January 14, 2008, a Motion to Strike Agency's Pleading of January 30, 2008/Motion to Consolidate IRAs of Ms. Howerton, Ms. Syrkes and

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¹ We note that this statutory section applies to officers and employees of the U.S. Postal Service and is not applicable to this matter.

Mr. Carter and a Motion for Certification of Interlocutory Appeal to the Court of Appeals for the Federal Circuit (Federal Circuit). PFRF, Tabs 4, 5, 7.

ANALYSIS

 $\P 5$

To be timely, a PFR must be filed within 35 days after the initial decision was issued or, if the appellant shows that he received the initial decision more than 5 days after it was issued, within 30 days after the date it was received. 5 C.F.R. § 1201.114(d). Here, the initial decision was issued on October 30, 2007, and it stated that it would become final on December 4, 2007, unless a PFR was filed by that date. IAF, Tab 17 at 4. The appellant does not allege that she received the initial decision more than 5 days after its issuance date and she did not file her PFR until January 8, 2008. PFRF, Tab 1. Thus, the PFR was filed 35 days late.

 $\P 6$

The Board will waive its time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. § 1201.114(f). To establish good cause for the untimely filing of a petition, the appellant must show that she 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). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of her excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to her inability to timely file her petition. Moorman v. Department of the Army, 68 M.S.P.R. 60, 62-63 (1995), aff'd, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

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The appellant indicated on her PFR form that she was represented. PFRF, Tab 1 at 9. Additionally, a 35-day delay is not minimal. *See, e.g., Summerset v. Department of the Navy*, 100 M.S.P.R. 292, ¶ 7 (2005) (noting that a 33-day delay

is significant). Moreover, the appellant has not offered any evidence whatsoever to support a claim of good cause for the delay in filing her PFR. For the foregoing reasons, we DENY her Motion to Accept Late Filed PFR and we DISMISS the PFR as untimely filed with no showing of good cause for the delay.² *See* 5 C.F.R. § 1201.114(f).

ORDER

 $\P 8$

This is the final decision of the Merit Systems Protection Board regarding the timeliness of the PFR. The initial decision will remain the final decision concerning the dismissal of the appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit 717 Madison Place, N.W. Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does

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² Because of our disposition on the timeliness of the appellant's PFR, we need not address the appellant's Request for Consolidation of IRA Cases/Appellants' Request for Certification by the Board of Class Action of Blacks/Appellant Carter's Response to Order of January 14, 2008, her Motion to Strike Agency's Pleading of January 30, 2008/Motion to Consolidate IRAs of Ms. Howerton, Ms. Syrkes and Mr. Carter or her Motion for Certification of Interlocutory Appeal to the Federal Circuit.

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not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. See Pinat v. Office of Personnel

Management, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to

court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

this law, as well as review the Board's regulations and other related material, at

our website, http://www.mspb.gov. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the

court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer Clerk of the Board Washington, D.C.