UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 99

Docket No. AT-0752-08-0459-I-1

Johnny Lynn Jones,
Appellant,
v.
Department of the Army,
Agency.

June 5, 2009

Alfred F. Livaudais, Jr., Esquire, Daleville, Alabama, for the appellant.

Heather A. Pepin, Esquire, Fort Rucker, Alabama, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal as withdrawn. For the reasons set forth below, we DISMISS the petition for review as untimely filed without good cause shown for the delay, but we FORWARD the petition for review to the Atlanta Regional Office for docketing and processing as a separate appeal challenging the continuation of the appellant's indefinite suspension.

BACKGROUND

¶2 The appellant was employed by the agency as a supervisory traffic management specialist. Initial Appeal File (IAF), Tab 3, Subtab 1d. On October

2, 2007, the agency placed the appellant on administrative leave pending an investigation into whether the appellant and another employee misused government equipment and improperly solicited any services in the name of the Garrison Commander. *Id.*, Subtabs 1q, 1r. On December 17, 2007, the agency proposed the appellant's removal for making false statements, misuse of government property, conduct unbecoming of a federal employee and the suspension of his security clearance. *Id.*, Subtab 1m at 1-2.

¶3 On January 25, 2008, the agency rescinded the notice of proposed removal. IAF, Tab 3, Subtab 1i. On the same day, the agency proposed the appellant's indefinite suspension pending the completion of a criminal investigation. *Id.*, Subtab 1h. After the appellant responded to his proposed indefinite suspension, *see id.*, Subtab 1f, the agency issued a decision letter suspending the appellant indefinitely, effective February 26, 2008. *Id.*, Subtabs 1d, 1e.

¶4 On March 19, 2008, the appellant filed a Board appeal challenging his indefinite suspension. IAF, Tab 1. In its response to the appeal, the agency submitted the affidavit of Captain Nathan T. Golden, a Special Assistant United States Attorney (SAUSA). IAF, Tab 3, Subtab 1b. Captain Golden stated that he had determined that there was sufficient evidence to prosecute the appellant criminally, and that he had forwarded the information to the United States Attorney's Office for the Middle District of Alabama for a determination of whether to proceed with felony or misdemeanor charges. *Id.*

¶5 On May 12, 2008, the appellant, through counsel, moved to dismiss the appeal. IAF, Tabs 5-6. On May 21, 2008, the administrative judge issued an initial decision dismissing the appeal as withdrawn. IAF, Tab 7. The initial decision became final on June 25, 2008. *Id.*

¶6 On December 30, 2008, the appellant filed a Board appeal via e-appeal. PFR File, Tab 1. In that appeal, the appellant challenged the same indefinite suspension that was the subject of his withdrawn appeal. *See id.* at 4. He argued that he had withdrawn his appeal on the basis of the agency's assertion that

criminal charges were pending against him. *Id.* at 7. The appellant stated that no charges had been filed against him in the intervening 8 months. *Id.* He therefore requested that the Board reinstate his appeal. *Id.*

¶7 The Atlanta Regional Office forwarded the appellant's new appeal to the Clerk of the Board for processing as a petition for review of the initial decision dismissing his prior appeal as withdrawn. PFR File, Tab 1 at 1. On January 16, 2009, the Clerk informed the appellant that his petition for review appeared to be untimely and that an untimely petition for review must be accompanied by a motion to (1) accept the filing as timely, and/or (2) waive the time limit for good cause. PFR File, Tab 3 at 1. The appellant filed a motion to waive the time limit on January 23, 2009. PFR File, Tab 4. He indicated that he had withdrawn his appeal on the basis of Captain Golden's affidavit, which indicated that criminal charges were pending and that the investigation was ongoing. *Id.* at 2-3. He argued that the government's failure to act during the intervening months had made his indefinite suspension unreasonable. *Id.* at 5. He further argued that the government was deliberately trying to prevent him from obtaining independent review of the agency's actions. *Id.* at 5-6.

¶8 In its response to the petition for review, the agency argued that it has no influence over the timing of criminal charges and that the petition for review should be denied because criminal charges against the appellant are still pending. PFR File, Tab 5 at 1. The agency also submitted the affidavit of SAUSA Nicole K. Borchardt. *Id.* at 4. She indicated that she expected criminal charges to be filed in time for the appellant to be arraigned at the U.S. District Court session on March 10, 2009. *Id.*

ANALYSIS

¶9 The Clerk of the Board processed the appellant's new appeal as a petition for review, PFR File, Tab 3, and the appellant has filed a motion to waive the time limit for filing the petition, PFR File, Tab 4. Considering the appellant's

submission as a petition for review, it appears to be untimely filed. Generally, a petition for review must be filed within 35 days after the issuance of the initial decision. 5 C.F.R. § 1201.114(d). The initial decision in this case was issued on May 21, 2008; therefore, the last day that the appellant could have filed a timely petition for review was June 25, 2008. The appellant filed this petition for review on December 30, 2008. PFR File, Tab 1. The appellant's petition was therefore untimely by more than 6 months.

¶10 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); *see Arrieta v. Department of Homeland Security*, 108 M.S.P.R. 372, ¶ 7 (2008). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Arrieta*, 108 M.S.P.R. 372, ¶ 7; *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). The appellant's only justification for his delay in filing his petition for review is that the agency represented at the time he withdrew his appeal that criminal charges were pending against him but that no criminal charges have yet been filed. PFR File, Tab 4 at 2-5. He has not identified any circumstances beyond his control that affected his ability to file a petition for review by June 25, 2008, and he has not explained why his delay of more than 6 months in filing while he waited for criminal charges to be filed reflected due diligence or ordinary prudence. Accordingly, we find that the

appellant has failed to show good cause for his delay in filing, and we dismiss the petition for review as untimely filed. *See Arrieta*, 108 M.S.P.R. 372, ¶ 7.*

¶11 However, we find that the appellant's submission should also be considered as a separate appeal challenging the continuation of his indefinite suspension. To be valid, an indefinite suspension must have an ascertainable end, that is, a determinable condition subsequent that will bring the suspension to a conclusion. *Arrieta*, 108 M.S.P.R. 372, ¶ 8; *Cooper v. Department of Health & Human Services*, 80 M.S.P.R. 612, ¶ 5 (1999). An indefinite suspension may extend through the completion of both a pending investigation and any subsequent administrative action. *See* 5 C.F.R. § 752.402(e). In such circumstances, however, an agency must initiate administrative action within a reasonable period of time after completion of the pending investigation. *Engdahl v. Department of the Navy*, 900 F.2d 1572, 1578-79 (Fed. Cir. 1990); *Arrieta*, 108 M.S.P.R. 372, ¶ 8. To permit the agency to take an unlimited amount of time to determine what action to take while keeping the appellant on an indefinite suspension would run contrary to the requirement that an indefinite suspension have an ascertainable end. *See Arrieta*, 108 M.S.P.R. 372, ¶ 8.

¶12 Our reviewing court has held that the imposition of an indefinite suspension and the failure to terminate that suspension after the condition subsequent has occurred are separately reviewable agency actions. *Rhodes v. Merit Systems Protection Board*, 487 F.3d 1377, 1381-82 (Fed. Cir. 2007). In *Rhodes*, the United States Court of Appeals for the Federal Circuit held that an employee's election to grieve the imposition of his indefinite suspension did not preclude him from filing a Board appeal challenging the continuation of that

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* To the extent that the appellant requests the Board to reopen his original appeal, we decline to exercise our discretion to do so. In the absence of an error that implicates an employee's basic procedural rights, the Board will not reopen an appeal to cure the untimeliness of a petition for review. *See Sellers v. U.S. Postal Service*, 98 M.S.P.R. 44, ¶ 7 (2004). The appellant has established no such error.

suspension beyond the condition subsequent. *Id.* Applying the same logic to the present case, we find that the appellant's withdrawal of his appeal challenging the imposition of his indefinite suspension does not preclude him from filing a separate appeal challenging the continuation of that suspension. *See Arrieta*, 108 M.S.P.R. 372, ¶ 9. We construe his December 30, 2008 submission to the Board as an attempt to challenge the continuation of the indefinite suspension. *See* PFR File, Tab 1.

¶13 The agency's decision notice stated that the appellant was suspended indefinitely "pending the investigation of probable criminal conduct." IAF, Tab 3, Subtab 1e at 1. The appellant alleges on review that "there has been no additional investigation by the [a]gency" since December 13, 2007. PFR File, Tab 4 at 5. He further alleges that, while the agency contends that criminal charges remain pending, the United States Attorney has declined to prosecute him for a felony, and has not initiated any misdemeanor charges against him. *Id.* at 3-5. The agency continues to maintain that criminal charges are pending against the appellant, but that the timing of charges being brought is within the discretion the United States Attorney and is not a matter over which the agency has any influence. PFR File, Tab 5 at 1. It has submitted the sworn affidavit of SAUSA Borchardt, stating that, as of February 5, 2009, she expected federal charges against the appellant to be filed "soon," so he could be arraigned on March 10, 2009. *Id.* at 4.

¶14 The parties have raised an issue of fact as to whether the condition subsequent that would terminate the appellant's suspension has occurred so as to trigger the agency's obligation to end the indefinite suspension within a reasonable time. We make no finding as to whether the condition subsequent has occurred. Rather, it is appropriate to forward the appellant's claims regarding the continuation of his indefinite suspension to the regional office for adjudication. *See Arrieta*, 108 M.S.P.R. 372, ¶ 10; *Romero v. Department of Defense*, 104 M.S.P.R. 245, ¶ 12 (2006).

ORDER

¶15 Accordingly, we FORWARD the appellant's petition for review to the Atlanta Regional Office for docketing and processing as a separate appeal challenging the continuation of the appellant's indefinite suspension.

¶16 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision remains the final decision of the Board with regard to the withdrawal of the original 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 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:

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