UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 129

Docket No. DC-0731-09-0064-I-1

Yolanda C. Gibson-Michaels,

Appellant,

v.

Federal Deposit Insurance Corporation,

Agency.

July 9, 2009

Yolanda C. Gibson-Michaels, Temple Hills, Maryland, pro se.

David G. Eisenstein, Esquire, and Thomas J. Sarisky, Esquire, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed her appeal of her removal as barred by res judicata. We DENY the PFR because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. For the reasons set forth below, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the ID, and DISMISS the appellant's appeal as more than twenty-nine months untimely filed with no good cause shown for the delay and DENY the request to reopen her prior removal appeal.

BACKGROUND

¶2 Effective March 31, 2006, the agency removed the appellant, a CG-11 Information Specialist, for Disrespectful and/or Inappropriate Conduct and Failure to Follow Instructions. Initial Appeal File (IAF), Tab 5, Subtab B. On April 28, 2006, the appellant filed an appeal of her removal with the Board. *Id.*, Subtab C. On July 24 and 25, 2006, the appellant submitted written statements to the administrative judge (AJ) requesting to withdraw her appeal.[1] *Id.*, Subtabs K, L. The AJ thus issued an ID on July 25, 2006, dismissing the appeal as withdrawn. *Gibson-Michaels v. Federal Deposit Insurance Corporation*, MSPB Docket No. DC-0752-06-0515-I-1 (Initial Decision, July 25, 2006); IAF, Tab 5, Subtab M. The ID became final on October 26, 2006, when the Board denied the appellant's PFR by Final Order. IAF, Tab 5, Subtab O.

¶3 The appellant filed this appeal on October 27, 2008, again challenging her March 31, 2006 removal and requesting a hearing. IAF, Tab 1 at 3-4. The appellant claimed that the agency violated Office of Personnel Management (OPM) suitability regulations by removing her without notifying OPM and seeking its approval. *Id.* at 6, 8. This appeal was assigned to a different AJ than had dismissed the appellant's previous removal appeal. IAF, Tab 2 at 8.

¶4 The AJ issued an acknowledgment order explaining that the appeal may be untimely and ordered the appellant to file evidence and argument showing that her appeal was timely filed or that good cause existed for the delay. IAF, Tab 2 at 2-3. In response, the appellant filed a "Motion for Waiver of Time Limitation" in which she claimed that the agency prevented her from timely filing an appeal because it did not provide her with documents which allegedly show that the agency's investigator who conducted a tape-recorded interview with her was unlicensed and "an imposter." IAF, Tab 3 at 2, 7. In addition, the appellant

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[1] The statement that the appellant submitted on July 25, 2006, is incorrectly dated July 26, 2006. IAF, Tab 5, Subtab L.

alleged that good cause exists for her untimely filing because she was not aware that she could request a waiver of the time limit for filing an appeal until she submitted her appeal in October 2008. *Id.* at 2.

¶5 In its response to the acknowledgment order, the agency argued that the appeal should be dismissed as barred by res judicata and/or as untimely, arguing that the appellant: (1) already filed an appeal of this same action in MSPB Docket No. DC-0752-06-0515-I-1 that was dismissed with prejudice pursuant to the appellant's request to withdraw her appeal; and (2) has filed this appeal of her removal approximately two and one-half years after the effective date of her removal. IAF, Tab 5 at 8-10.

¶6 The AJ then issued a show-cause order directing the appellant to show why her removal appeal should not be dismissed for the reasons discussed by the agency in its response to the acknowledgment order. IAF, Tab 6. The appellant submitted a response to the AJ's show-cause order; however, her response did not address the issues cited by the AJ in that order.[2] IAF, Tab 7.

¶7 Without holding the requested hearing, the AJ issued an ID dismissing the appeal as barred by res judicata based on the appellant's withdrawal of her prior removal appeal.[3] IAF, Tab 8 (ID) at 2-3. The ID did not address the timeliness of the appeal.

¶8 The appellant has filed a PFR in which she reiterates her argument below that her removal was not in accordance with "mandatory OPM suitability

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[2] In her response to the show-cause order, the appellant seemed to confuse this appeal with her individual right of action (IRA) appeal that was pending before the same AJ when the AJ issued the show-cause order in this appeal. *Gibson-Michaels v. Federal Deposit Insurance Corporation*, MSPB Docket No. DC-1221-08-0698-W-1; IAF, Tab 7. Thus, the appellant's response addressed the Board's jurisdiction over her IRA appeal and the timeliness of that appeal, but not the timeliness of this appeal or whether this appeal is barred by res judicata. IAF, Tab 7.

[3] The first paragraph of the ID mistakenly identifies the basis for dismissal as collateral estoppel rather than res judicata. IAF, Tab 8 (ID) at 1.

guidelines" and alleges that the AJ failed to apply "principles of equitable tolling to her appeal." Petition for Review File (PFRF), Tab 1 at 5. The agency has filed a response in opposition to the PFR. PFRF, Tab 3.

ANALYSIS

¶9 On PFR, the appellant has not put forth any argument establishing error by the AJ or presented any new and material evidence that affects the outcome of this case. *See* 5 C.F.R. § 1201.115(d)(1); *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). We therefore deny the PFR.

¶10 However, where an appellant has filed a second appeal with the Board after withdrawing her first one, it is generally appropriate to consider the second appeal as a new, late-filed appeal and to determine whether good cause exists for the filing delay. *E.g.*, *Robey v. U.S. Postal Service*, 105 M.S.P.R. 539, ¶ 11, *aff'd*, 253 F. App'x 933 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1925 (2008). Thus, we reopen this case on our own motion and vacate the ID. Further, AJs lack the authority to reopen or reinstate appeals in which there has been a final Board decision; that authority is reserved to the Board. 5 U.S.C. § 7701(e)(1)(B); *Robey*, 105 M.S.P.R. 539, ¶ 10; 5 C.F.R. §§ 1201.112, .118.

The appellant's October 27, 2008 appeal is an untimely appeal of her March 31, 2006 removal, and she has not shown good cause for the filing delay.

¶11 Generally, an appeal must be filed no later than thirty days after the effective date of the action being appealed or thirty days after the date of receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The agency's decision notice stated that the appellant's removal was effective March 31, 2006. IAF, Tab 5, Subtab B at 5. According to the appellant's April 28, 2006 initial appeal, she received the decision notice on March 27, 2006. *Id.*, Subtab C at 3. Thus, this appeal should have been filed no later than May 1, 2006,[4] and the

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[4] Under 5 C.F.R. § 1201.23, if the date that ordinarily would be the last day for filing falls on a Saturday, Sunday or Federal holiday, the filing period will include the first

appellant's appeal filed on October 27, 2008, was almost thirty months late. *See* 5 C.F.R. § 1201.22(b).

¶12 To establish good cause for the untimely filing of an appeal, a party 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).

¶13 After considering the appellant's arguments and submissions in response to the AJ's timeliness show-cause notice in the acknowledgment order, we find that she has not established good cause for the untimely filing of her appeal. The appellant was properly informed in the removal decision notice of her right to appeal to the Board and the time limit for doing so. IAF, Tab 5, Subtab B at 5-6. In addition, although the appellant is pro se, her filing delay of almost thirty months is significant. *See, e.g., Greenberg v. Department of Justice*, 91 M.S.P.R. 42, ¶ 6 (2002) (a filing delay of over six months was significant).

¶14 Further, the appellant's contention that the agency did not provide her with documents that allegedly showed that the agency's investigator was unlicensed does not establish good cause for the untimely filing of her appeal. IAF, Tab 3 at 2, 4. The record shows that the appellant made the allegation that the agency's

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workday after that date. Thirty days after the effective date of the March 31, 2006 removal action, April 30, 2006, was a Sunday. Therefore the last day for filing the appeal was May 1, 2006.

investigator was unlicensed in her prior removal appeal and she had ample opportunity to engage in discovery and litigate this allegation during that appeal. IAF, Tab 5, Subtab C at 2, 4, 9, Subtab E at 7, Subtab G at 2, Subtab I at 3. The appellant's apparent contention that the agency interfered with her ability to accumulate evidence is not supported by any evidence, and thus does not constitute good cause for her untimely filing. *See Kraning v. Department of the Treasury*, 43 M.S.P.R. 86, 87-88 (1989), *aff'd*, 907 F.2d 158 (Fed. Cir. 1990) (Table).

¶15 The appellant's claim that she was unaware that she could ask for an extension of the time limit for filing her appeal also does not constitute good cause for her untimely filing. The appellant's failure to make inquiry at the Board for the almost thirty-month period of the delay shows a lack of due diligence under the circumstances. *See Jones v. Department of the Air Force*, 66 M.S.P.R. 204, 210 (1995); *Medina v. Department of the Air Force*, 66 M.S.P.R. 194, 198, *review dismissed*, 53 F.3d 348 (Fed. Cir. 1995) (Table). Also, an appellant's lack of sophistication in Board matters and unfamiliarity with Board procedures are insufficient to show good cause for the delay. *See Sumrall v. Department of the Air Force*, 85 M.S.P.R. 597, ¶ 13 (2000). Thus, the appellant has not shown good cause for waiver of the time limit with respect to her appeal, and we dismiss her appeal as untimely filed.[5] *See Alonzo*, 4 M.S.P.R. at 184.

The appellant has not established a basis for reopening or reinstating her previously dismissed appeal.

¶16 We also decline to exercise our discretion to reopen the appellant's prior removal appeal. *See* 5 C.F.R. § 1201.118. Generally, the withdrawal of an appeal is an act of finality that has the effect of removing the appeal from the

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[5] Because we dismiss this appeal as untimely filed, we do not reach the issue of whether the appellant's appeal was barred by her prior appeal that was dismissed as withdrawn on July 25, 2008. *See Robey*, 105 M.S.P.R. 539, ¶ 19 n.3.; *Nabors v. U.S. Postal Service*, 31 M.S.P.R. 656, 659 n.2 (1986), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table).

Board's jurisdiction. *See Nazario v. Department of Justice*, 108 M.S.P.R. 468, ¶ 4 (2008). Absent unusual circumstances, such as misinformation or new and material evidence, the Board will not reopen or reinstate an appeal once it has been withdrawn merely because the appellant now wishes to proceed before the Board. *Id.*; *Robey*, 105 M.S.P.R. 539, ¶ 20.

¶17 Here, there is no basis for reopening or reinstating the appellant's prior removal appeal. The record shows, and the appellant does not dispute, that she voluntarily and unequivocally withdrew her prior Board appeal. IAF, Tab 5, Subtabs K, L. The appellant has not alleged that her original appeal was erroneously dismissed or that she withdrew her appeal because she was misled or misinformed, and she has not submitted any new and material evidence. Under these circumstances, we find no basis for reopening or reinstating the appellant's prior appeal. *See Robey*, 105 M.S.P.R. 539, ¶ 21; *Duncan v. U.S. Postal Service*, 96 M.S.P.R. 448, ¶ 8 (2004).

¶18 Accordingly, we dismiss this appeal as untimely filed with no showing of good cause for the delay and, further, deny the appellant's request to reopen her withdrawn appeal.

ORDER

¶19 This is the final decision of the Merit Systems Protection Board in this 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.