UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 163

Docket No. DA-315H-09-0297-I-1

Chiquita Simon,

Appellant,

v.

Department of Justice,

Agency.

August 27, 2009

Chiquita Simon, Fort Worth, Texas, pro se.

Michelle S. Hoppe, Phoenix, Arizona, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review (PFR) of the initial decision (ID) that dismissed her appeal as withdrawn. For the reasons set forth below, we GRANT the petition for review (PFR), VACATE the initial decision (ID), and REMAND the appeal to the Dallas Regional Office for adjudication consistent with this Opinion and Order (O&O).

BACKGROUND

¶2 Effective January 22, 2008, the agency appointed the appellant to a career conditional, competitive service position as a Correctional Officer with the Federal Medical Center-Carswell Air Force Base in Tarrant, Texas, subject to her

completion of a 1-year probationary period. Initial Appeal File (IAF), Tab 7, subtab 4(f) at 1. On January 15, 2009, 7 days before the appellant's completion of her probationary period, the agency issued a decision notice terminating her effective that day for failure to carry out her supervisor's orders. *Id.*, subtab 4(b) at 1. However, the appellant resigned that day prior to the agency effecting her termination. *Id.*, subtabs 4(a), 4(c).

¶3 The appellant filed a Board appeal, disputing the merits of her probationary termination, and requested a hearing. IAF, Tab 1 at 4-7, 12. She designated a representative. *Id.* at 11.

¶4 The agency moved to dismiss the appeal for lack of jurisdiction over the appellant's resignation in lieu of a probationary termination. IAF, Tabs 6, 9. Subsequently, the administrative judge (AJ) issued show cause orders on April 1 and 15, 2009, ordering the appellant to make a nonfrivolous allegation of jurisdiction over her probationary termination by April 10 and 24, 2009. IAF, Tabs 8, 10.

¶5 On April 20, 2009, the appellant's representative filed a Motion for Withdrawal that contained a single sentence: "COMES NOW, Appellant by and through her representative the undersigned, hereby submits her MOTION FOR WITHDRAWAL in the above caption." IAF, Tab 12 at 1. The appellant's representative signed the motion, and the appellant was not on the certificate of service. *Id.* The AJ issued an ID dismissing the appeal as withdrawn. ID at 1-2. The appellant filed a pro se PFR of this decision asserting that she had not authorized her representative to withdraw the appeal. Petition for Review File (PFRF), Tab 1. The agency responded in opposition. PFRF, Tab 5.

ANALYSIS

¶6 The Board has determined that it is generally appropriate to treat a request for reconsideration of an appellant-initiated dismissal of an appeal as a late-filed petition for appeal or a request to reopen and reinstate a prior appeal. *Beeler v.*

Department of the Air Force, 110 M.S.P.R. 173, ¶ 5 (2008). Accordingly, we will treat the appellant's submission as a request to reopen her withdrawn appeal.

¶7 An appellant's withdrawal of an appeal is an act of finality, and, in the absence of unusual circumstances such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn. *Caracciolo v. Office of Personnel Management*, 86 M.S.P.R. 601, ¶ 3 (2000). An appellant's relinquishment of her right to appeal to the Board must be by clear, unequivocal, and decisive action. *Beeler*, 110 M.S.P.R. 173, ¶ 5 (citing *Etheridge v. Department of Veterans Affairs*, 67 M.S.P.R. 53, 56 (1995)). The withdrawal of an appellant's appeal by her designated representative has the same effect as a withdrawal by the appellant herself. *See Bass v. U.S. Postal Service*, 96 M.S.P.R. 683, ¶ 6 (2004). The Board has consistently held that an appellant is responsible for the actions of her chosen representative. *Id.* However, it is appropriate to reopen an appeal in the interest of justice, "particularly where the evidence is of such weight as to warrant a different outcome," and the appellant has exercised due diligence in seeking reopening. *Caracciolo*, 86 M.S.P.R. 601, ¶ 4. "[W]here an appellant's diligent efforts to prosecute her appeal were thwarted by her representative's negligence or malfeasance, the appellant and her representative were not acting as one, and the representative's negligence or malfeasance should not be attributed to the appellant." *Id.*, ¶ 5.

¶8 Where the appellant has raised a genuine question of fact as to whether she made a clear, unequivocal, and decisive act to relinquish her right to appeal to the Board, in the interest of justice, the Board has vacated the ID dismissing the appeal as withdrawn, and remanded the appeal. *See Beeler*, 110 M.S.P.R. 173, ¶¶ 6-9 (the appellant presented a statement under penalty of perjury averring that his attorney withdrew his appeal without his consent and that he pled with his attorney to amend the motion to state that he would proceed pro se, and the record evidence showed that his attorney notified the Board that he was withdrawing as counsel and that the appellant would be proceeding pro se, which

was at odds with the motion to withdraw the appeal in its entirety); *Caracciolo*, 86 M.S.P.R. 601, ¶¶ 6-8 (the appellant submitted an affidavit that her attorney had no authority to withdraw her appeal, the record contained two letters from the appellant's attorney stating without explanation that the appellant was withdrawing her appeal, and there was no indication that the letters were ever sent to the appellant). In *Caracciolo*, the Board found that "the record suggests no good reason for the appellant to have withdrawn her appeal, and, in light of her averred desire for an adjudication on the merits, further suggests that the appellant's former attorney might have been negligent in withdrawing the appellant's appeal on the eve of an adjudication by the Board." *Caracciolo*, 86 M.S.P.R. 601, ¶ 7.

¶9 Here, the appellant has timely filed her PFR, and asserts under penalty of perjury that "my represenative [sic] withdrew my claim without authorization several days before my court date. I was not given and [sic] equal and fair opportunity to present my side of the story. I have relevant information that could drastically change my case." PFRF, Tab 1 at 4. However, she does not submit any documents on review. The record evidence shows that the appellant did not sign the April 20, 2009 Motion for Withdrawal, and was not on the certificate of service. IAF, Tab 12 at 1. Based on the foregoing evidence and argument, we find that the appellant has exercised due diligence in seeking reopening, and has raised a genuine question of fact as to whether she acted in a clear, unequivocal and decisive way to relinquish her Board appeal rights. *See Beeler*, 110 M.S.P.R. 173, ¶ 9; *Caracciolo*, 86 M.S.P.R. 601, ¶ 8. Under these circumstances, it is appropriate to reopen this appeal in the interest of justice, and remand for a determination of whether the appellant's withdrawal of her appeal was voluntary. If the AJ determines that the appellant did not voluntarily withdraw her appeal, she may proceed with her reinstated appeal.

¶10 Accordingly, we VACATE the ID and REMAND this appeal to the Dallas Regional Office for adjudication consistent with this O&O.

FOR THE BOARD:

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