

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 168

Docket No. CH-0752-09-0497-I-1

**Nia T. Harris,
Appellant,**

v.

**United States Postal Service,
Agency.**

August 28, 2009

Nia T. Harris, Columbus, Ohio, pro se.

Jennifer S. Breslin, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a petition for review (PFR) of the initial decision (ID) that dismissed her case as an untimely appeal of her removal from federal employment without a showing of good cause for the delay. For the reasons set forth below, we DENY the petition for failure to meet the criteria for review under [5 C.F.R. § 1201.115](#)(d), REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and DISMISS the appeal for lack of Board jurisdiction.

BACKGROUND

¶2 The appellant, who is preference-eligible, was removed from her position as a Mail Handler effective August 5, 2008, for violation of a last-chance

agreement related to attendance deficiencies. Appeal File (AF), Tab 4 at 23. She filed a Board appeal. AF, Tab 1. In the ID, the administrative judge (AJ) dismissed the appeal as untimely filed without a showing of good cause for the filing delay. *Harris v. U.S. Postal Service*, MSPB Docket No. CH-0752-09-0017-I-1 (Initial Decision, October 30, 2008). Neither party filed a PFR of the ID, and the dismissal thus became the final decision of the Board. [5 C.F.R. § 1201.113](#). The appellant also had filed a July 24, 2008 grievance of her Notice of Proposed Removal. AF, Tab 4 at 92. The grievance was denied in a step 2 decision. *Id.* at 87.

¶3 Subsequently, the appellant filed this appeal, asserting that agency management and her union violated the collective bargaining agreement (CBA) by denying her an arbitration hearing on her grievance. AF, Tab 1. The agency filed a motion to dismiss the appeal, in part, for lack of Board jurisdiction over the grievance process and the CBA. *Id.*, Tab 4 at 5. The agency also asserted that the appeal was an untimely appeal of the appellant's removal and a duplicate of her prior appeal. *Id.* The appellant did not respond to the agency's motion. The AJ issued an Order stating that the appellant's appeal appeared untimely, utilizing the effective date of her removal, and directing her to show good cause for the delay. *Id.*, Tab 7. After the parties responded, the AJ issued an ID dismissing the appeal as an untimely filed appeal of the appellant's removal without a showing of good cause for the delay. *Id.*, Tab 11.

¶4 On PFR, the appellant reiterates her prior arguments regarding the reasons for her late filing. Petition for Review File (RF), Tab 1. The agency has responded in opposition to the PFR. *Id.*, Tab 4.

ANALYSIS

¶5 The Board may grant a PFR when an AJ makes an adjudicatory error affecting the outcome or when there is new and material evidence not previously available despite due diligence. [5 C.F.R. § 1201.115](#)(d). The appellant's PFR

does not meet either criterion and is therefore denied. We reopen the appeal on our own motion, however, because we find that the AJ erred in treating the appeal as an appeal of the appellant's removal and in dismissing it for a second time as untimely, rather than addressing the issue of the Board's jurisdiction over the matter actually appealed by the appellant.

The AJ erred in readjudicating the timeliness of the appellant's removal appeal.

¶6 As noted above, an ID dismissing the appellant's appeal of her removal was issued and became final. *Harris*, MSPB Docket No. CH-0752-09-0017-I-1. 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\(e\)\(1\)\(B\)](#); *Hall v. Department of the Interior*, [90 M.S.P.R. 32](#), ¶¶ 6-7 (2001); [5 C.F.R. §§ 1201.112\(a\)](#), 1201.118. Therefore, even assuming the appellant had again appealed her removal, as the AJ determined she had, it was improper to adjudicate it.

¶7 It is clear from the record, however, that the appellant did not file a second appeal of her removal but rather appealed from a different matter, i.e., the failure to obtain an arbitration proceeding. Therefore, this is the issue the AJ should have adjudicated.

The appeal must be dismissed for lack of Board jurisdiction.

¶8 The Board's jurisdiction is not plenary; it is limited to matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The existence of Board jurisdiction is the threshold issue in adjudicating an appeal, and the appellant bears the burden of establishing jurisdiction by a preponderance of the evidence. *Covington v. Department of the Army*, [85 M.S.P.R. 612](#), ¶ 9 (2000); [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#). Where an appellant makes a nonfrivolous allegation of Board jurisdiction over an appeal, she is entitled to a hearing on the jurisdictional question. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344

(Fed. Cir. 2006) (en banc). Nonfrivolous allegations are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994).

¶9 An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643 (Fed. Cir. 1985). However, an AJ's failure to provide an appellant with a proper *Burgess* notice can be cured if the agency's pleadings contain the notice that was otherwise lacking, or if the ID puts the appellant on notice of what she must do to establish jurisdiction, thus affording her the opportunity to meet her burden on PFR. *Scott v. Department of Justice*, [105 M.S.P.R. 482](#), ¶ 6 (2007).

¶10 In identifying the subject of this appeal, the appellant stated that "Management and my Union, the Local 304 Mailhandlers Union both violated Article 15. By wrongfully and hastily denying me the final step in the grievance process." [sic] AF, Tab 1. The appellant explained that she was denied the opportunity for arbitration because the union president had erroneously told management that she could not be contacted after her grievance was denied at step 2. *Id.* The appellant, who had moved, stated that neither management nor the union utilized the change of address system which had updated contact information for her. *Id.*

¶11 Her narrative shows that the appellant is raising a claim of breach of the union's duty of fair representation or other claim regarding the operation of the grievance process under the CBA. It is well settled that the Board lacks jurisdiction over such claims. *Greenspan v. Department of Veterans Affairs*, [94 M.S.P.R. 247](#), ¶ 21 (2003) (citing *Berry v. Department of Justice*, [31 M.S.P.R. 676](#), 677-78 (1986)), *rev'd on other grounds*, [464 F.3d 1297](#) (Fed. Cir. 2006); *Cockrell v. Department of the Air Force*, [58 M.S.P.R. 211](#), 217 (1993); *Wobschall*

v. Department of the Air Force, [43 M.S.P.R. 521](#), 523 n.*, *aff'd*, 918 F.2d 187 (Fed. Cir. 1990) (Table).

¶12 In this appeal, the AJ did not issue an order on jurisdiction but only on timeliness.* However, the agency's motion to dismiss asserted that the Board lacked jurisdiction over the appeal, because it addressed the operation of the grievance process under the CBA. AF, Tab 4 at 5. The agency reiterated its jurisdictional argument in its response to the AJ's timeliness order. *Id.*, Tab 9. The appellant did not respond to the agency's motion to dismiss or address the matter on PFR. We find that, under these circumstances, the agency's pleadings were sufficient to meet the *Burgess* requirement. See *Hanna v. U.S. Postal Service*, [101 M.S.P.R. 461](#), ¶ 12 (2006). The appellant was therefore placed on notice of the dispositive jurisdictional issue in this case and provided an opportunity to address the issue. She failed to do so. We therefore find that the appellant failed to carry her burden of proof on jurisdiction. Accordingly, the appeal must be dismissed for lack of jurisdiction.

ORDER

¶13 The appeal is DISMISSED for lack of jurisdiction. 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\(c\)](#)).

* In an order canceling the hearing the AJ initially scheduled, she stated that the appellant had raised matters relating to the handling of her grievance and that the Board did not have jurisdiction over such matters, AF, Tab 6 at 2, but the AJ did not issue a jurisdictional order meeting the *Burgess* requirements or dismiss the appeal on these grounds.

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:

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