UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 169

Docket No. DE-315I-08-0204-I-1

Georgene C. Small,

Appellant,

v.

Department of Homeland Security,

Agency.

August 28, 2009

Brian Lilletvedt, Esquire, Havre, Montana, for the appellant.

Steven J. Holtkamp, Esquire, Chicago, Illinois, 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appellant has filed a petition for review (PFR) of the April 7, 2008 initial decision (ID) that dismissed her appeal as withdrawn. We have considered the PFR as an untimely filed appeal and as a request to reopen the appeal. After full consideration, we DISMISS the appeal as untimely with no showing of good cause for the delay and DENY the request to reopen.[1]

[1] We therefore find it unnecessary to decide whether the Board has jurisdiction over the appeal. *See, e.g.*, *Tacujan v. U.S. Postal Service*, 109 M.S.P.R. 553, ¶ 1 n.1 (2008).

BACKGROUND

¶2 The appellant filed an appeal of her February 3, 2008 demotion from GS-12 Supervisory Mission Support Specialist to GS-11 Mission Support Specialist. Initial Appeal File (IAF), Tabs 1, 9, subtab A, 14 (February 21, 2008 SF-50). The administrative judge (AJ) informed her that the Board might lack jurisdiction over the appeal because employees who do not satisfactorily complete probation on initial appointments to supervisory positions and who are assigned to non-supervisory positions in accordance with the regulations have limited Board appeal rights. The AJ ordered her to prove jurisdiction. *Id.*, Tabs 2 at 2, 10. Citing health reasons, the appellant subsequently withdrew her appeal. *Id.*, Tab 15. In the April 7, 2008 ID, the AJ accepted the withdrawal, finding that it was freely and knowingly made. *Id.*, Tab 16. The ID became the Board's final decision on May 12, 2008, when neither party filed a PFR.

¶3 On June 1, 2009, the appellant filed her PFR, in which she asked the Board to reinstate her appeal. She attached a motion, her affidavit, and her husband's affidavit. PFR File, Tab 1. The agency filed a response opposing the PFR. *Id.*, Tab 6.

ANALYSIS

¶4 An appellant's withdrawal of her appeal is an act of finality that removes the appeal from the Board's jurisdiction. Absent unusual circumstances, such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn merely because the appellant wishes to proceed before the Board or to cure an untimely PFR. A case may be reopened in the interests of justice where the evidence is of such weight as to warrant a different outcome, but the Board will reopen a case only if the appellant has exercised due diligence in seeking reopening. *See, e.g., Tacujan v. U.S. Postal Service*, 109 M.S.P.R. 553, ¶ 9 (2008). The Board has found it appropriate to consider a PFR of an appellant-initiated dismissal of an appeal as a late-filed

appeal or as a request to reopen and reinstate the prior appeal. *See, e.g., Bilbrew v. U.S. Postal Service*, 111 M.S.P.R. 34, ¶ 5 (2009); *cf. Trachtenberg v. Department of Defense*, 104 M.S.P.R. 640, ¶¶ 7, 12 (2007) (treating such a PFR as a PFR or a request to reopen the appeal). Here, though, the appellant's assertions show that she is requesting only that the Board reopen and reinstate her appeal. We therefore consider her request as such.[2] *See, e.g., Stewart v. Department of Health & Human Services*, 100 M.S.P.R. 661, ¶ 4 (2005).

¶5 The appellant asserts that she withdrew her appeal based upon the agency's false and misleading information. Specifically, she asserts as follows: On January 30, 2008, Assistant Chief Charles Albrecht advised her that her demotion would not affect her pay because she would be demoted from a GS-12, step 2, to a GS-11, step 9, with no wage loss. She had no reason to doubt Albrecht's representation and relied on it in deciding to withdraw her appeal. Further, his representation was born out when, following her demotion, her pay was set at GS-11, step 9, effective Pay Period 2, and she was paid at that rate for the rest of the year. She did not discover that Albrecht's information was false until January 8, 2009, when she received a bill from the National Finance Center, Payroll Division, notifying her that she had been incorrectly placed at step 9; that she should have been reduced to step 4, which was a difference of $9,082 a year; that the mistake was not corrected until Pay Period 24; that she had been overpaid $4,861.75; and that she would have to reimburse the government. She would not have withdrawn her appeal absent the false information from the agency. PFR File, Tab 1.

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[2] In any event, for the same reasons set forth in denying the appellant's request to reopen, we dismiss the appeal as untimely filed by more than 1 year with no showing of good cause for the delay. 5 C.F.R. § 1201.22(b); *see, e.g., 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); *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

¶6 The appellant has failed to show that the Board should reopen and reinstate her appeal because she has not shown that she exercised due diligence in seeking reopening. Even if we accept the appellant's assertions that the agency misinformed her, and that she did not discover that she had been misinformed until January 8, 2009, she has not explained why she waited until June 1, 2009 -- almost 5 months -- to file her request to reinstate her appeal. Further, the appellant mentions that she filed an appeal of the agency's action informing her that she had been overpaid and would have to reimburse the government and that, "[d]uring the course of [that] appeal she was advised she could move the Board to reopen her appeal in this case." PFR File, Tab 1 at 6. The ID issued in that subsequent appeal, *Small v. Department of Homeland Security*, MSPB Docket No. DE-3443-09-0174-I-1 (Initial Decision, Apr. 2, 2009), dismissed the appeal for lack of jurisdiction and became the Board's final decision on May 7, 2009, after neither party filed a PFR.

¶7 Of significance here, the AJ noted in *Small*, MSPB Docket No. DE-3443-09-0174-I-1, that she had issued a February 20, 2009 order in which she informed the appellant that she could ask the Board to reopen the present case. Specifically, the AJ stated:

> Finally, that order advised the appellant that if she wished to reopen her prior Board appeal regarding her demotion, which was dismissed with prejudice as withdrawn, she may file a petition for review of her appeal, *Small v. Department of Homeland Security*, DE-315I-08-0204-I-1(Initial Decision, April 7, 2008) with the Clerk of the Board in accordance with 5 C.F.R. § 1201, subpart C, and the instructions contained in the Initial Decision.

ID at 3. The appellant has not contested the AJ's statement that she was advised in the February 20, 2009 order, i.e., over 3 months before she filed her request, that she could ask the Board to reopen this appeal.

¶8 In deciding whether to reopen an appeal, the Board balances the desirability of finality and the public interest in reaching what ultimately appears to be the right result. The need for finality generally requires that the reopening

authority be exercised within a reasonable period of time. A reasonable period of time, absent unusual circumstances, is generally measured in weeks rather than years. *E.g., Powell-Johnson v. U.S. Postal Service*, 103 M.S.P.R. 340, ¶ 14 (2006). Here, regardless of whether the appellant's delay in requesting reopening on June 1, 2009, is measured from January 8, 2009, when she was notified of the overpayment, or from February 20, 2009, when the AJ specifically informed her that she could request reopening, we find that the appellant failed to exercise due diligence. *See, e.g., Bilbrew*, 111 M.S.P.R. 34, ¶ 14. Accordingly, we deny her request to reinstate her withdrawn appeal.

ORDER

¶9 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.