

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

**2010 MSPB 64**

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Docket No. SF-0353-09-0590-I-1

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**Denise Lincoln,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

April 14, 2010

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Omar Gonzalez, Burlingame, California, for the appellant.

Carla Ceballos, Esquire, Long Beach, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the July 29, 2009 initial decision that dismissed her appeal as withdrawn. We DENY the appellant's petition because it does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#). We have also considered the appellant's petition as a request to reopen her withdrawn appeal under 5 C.F.R. § 1201.118, and we DENY her request.

**BACKGROUND**

¶2 The appellant, a non-preference eligible, is employed as a Postal Clerk. Initial Appeal File (IAF), Tab 2. In May 1995, she suffered a job-related injury,

for which she was awarded compensation by the Office of Workers' Compensation Programs (OWCP). IAF, Tab 7, Subtab 1. As of the beginning of April 2008, the appellant had partially recovered and was working a modified light duty assignment. IAF, Tab 8, Ex. E (April 2, 2008 Offer of Modified Assignment). However, by letter dated April 3, 2009, the appellant's supervisor informed her that the agency could not identify available operationally necessary tasks within her medical restrictions. *Id.*, Ex. J. Although the Board has held that the rescission of restoration rights that were previously granted may be appealable under [5 C.F.R. § 353.304\(c\)](#), *see Brehmer v. U.S. Postal Service*, [106 M.S.P.R. 463](#), ¶ 8 (2007), the agency's letter did not include notice of Board appeal rights. IAF, Tab 8, Ex. J.

¶3 On April 28, 2009, the appellant filed an appeal with the Board, alleging that the agency had arbitrarily and capriciously denied her restoration after a compensable injury and placed her on enforced leave. IAF, Tabs 1, 2. She requested a hearing. *Id.*, Tab 2. The administrative judge informed the appellant of her burden of proof on jurisdiction under [5 C.F.R. § 353.304\(c\)](#), and both parties responded on the issue. IAF, Tabs 3, 7, 8. The appellant also filed a motion to compel discovery. IAF, Tab 10.

¶4 Meanwhile, in June 2009, the appellant returned to duty on a new modified assignment. IAF, Tab 8, Ex. K. On June 26, 2009, the administrative judge conducted a telephonic status conference, at which she informed the appellant that she could not pursue her constructive suspension claim because she lacked adverse action appeal rights under [5 U.S.C. § 7511\(a\)\(1\)](#) or [39 U.S.C. § 1005\(a\)\(4\)\(A\)](#). IAF, Tab 13. The administrative judge further stated that, because the appellant had been restored to duty, the appeal would likely be dismissed as moot. *Id.* However, the administrative judge also found that the appellant had made a non-frivolous allegation of jurisdiction under [5 C.F.R. § 353.304\(c\)](#), and was thus entitled to a hearing. *Id.* In addition, the administrative judge denied the appellant's motion to compel discovery as moot,

finding that the agency had made the requested disclosures. *Id.* The appellant filed a timely objection to the summary of the status conference, contending that, although she had agreed to withdraw her constructive suspension claim, she was still seeking compensation for annual leave she was forced to use while off duty. IAF, Tab 14. The appellant also objected to the administrative judge's discovery ruling. *Id.*

¶5 On July 22, 2009, the parties submitted a settlement agreement, in which the appellant agreed to withdraw her Board appeal, and the agency agreed that she could grieve the matter instead. IAF, Tab 18. During a July 28, 2009 telephonic conference, memorialized in the July 29, 2009 initial decision, the administrative judge advised the parties that, since the appellant was already entitled to pursue a grievance, the agreement was unenforceable due to lack of consideration. IAF, Tab 20 at 2. The appellant subsequently filed a notice of withdrawal, which she signed personally. IAF, Tab 19. The notice stated as follows:

The Agency has restored the appellant to duty. Pursuant to a teleconference with the [administrative judge] today to discuss a previously signed settlement agreement with the Agency, the Appellant knowingly withdraws her MSPB appeal and shall pursue her grievance appeal on the matter through the Collective Bargaining Agreement process.

Although the Appellant does not fully comprehend how withdrawing her MSPB appeal gives her anything different than the previous settlement this submission is hereby made to address any concerns of the [administrative judge].

*Id.* The administrative judge dismissed the case, finding that the appellant had clearly and unequivocally withdrawn her appeal. IAF, Tab 20. The initial decision noted that there had been no determination as to whether the matter was within the Board's jurisdiction. *Id.*

¶6 On August 27, 2009, the appellant petitioned for review of the initial decision, asserting that her withdrawal was "an act of frustration" and the result of "misinformation" by the administrative judge. She contends that, at the June

26, 2009 status conference, the administrative judge informed her that there was no process for recovery of the annual leave she used while off duty and insisted that she withdraw her appeal because the Board lacks jurisdiction. According to the appellant, the administrative judge also informed her that arbitration could take up to 10 years. The appellant reiterates her objections to the administrative judge's decision to deny her motion to compel, and also complains that the administrative judge failed to facilitate settlement. She further states that she was "confounded" by the administrative judge's "confusing" rulings on discovery and jurisdiction. Petition for Review File, Tab 1.

### ANALYSIS

The appellant's petition for review is denied.

¶7 An appellant's withdrawal of an appeal is an act of finality which removes the appeal from the Board's jurisdiction. *Page v. Department of Transportation*, [110 M.S.P.R. 492](#), ¶ 5 (2009). A voluntary withdrawal must be clear, decisive, and unequivocal. *Id.* The record reflects that the appellant unequivocally expressed her intent to withdraw the appeal, both in the agreement and in the withdrawal letter that followed. *See* IAF, Tabs 18, 19. Although she expressed confusion as to why the administrative judge did not accept the withdrawal of her appeal pursuant to the settlement agreement, she made clear that she wished to withdraw her appeal regardless. Moreover, the appellant has not shown that her decision to withdraw the appeal was involuntary due to misinformation. The administrative judge correctly advised the appellant that she lacked adverse action appeal rights under [5 U.S.C. § 7511\(a\)\(1\)](#) or [39 U.S.C. § 1005\(a\)\(4\)\(A\)](#), and that there was no Board procedure through which she could obtain compensation for the annual leave she used during the period she was off duty between April and June 2009. *See* [5 C.F.R. § 353.304\(c\)](#) (appeal rights for partially recovered employees are limited to a determination of whether the agency is acting arbitrarily and capriciously in denying restoration or whether,

following reemployment, the agency failed to credit time spent on compensation for the purpose of rights and benefits based upon length of service). Furthermore, there is no evidence that the administrative judge told the appellant that the Board lacked jurisdiction over her restoration appeal or advised her to withdraw the appeal for that reason. *See Hazen v. Office of Personnel Management*, [20 M.S.P.R. 98](#), 99 (1984) (declining to reinstate an appeal where there was nothing in the record to lend credence to the appellant's allegations of misinformation by the administrative judge). Indeed, the administrative judge's summary of the June 26, 2009 status conference stated that the appellant had made a non-frivolous allegation of Board jurisdiction sufficient for a hearing, and in the initial decision the administrative judge indicated that the issue of jurisdiction had not been decided.<sup>1</sup> IAF, Tabs 13, 20. Furthermore, had the administrative judge told the appellant at the status conference that the Board lacked jurisdiction, presumably the appellant would have raised the issue in her objection to the conference summary, which she did not do. *See* IAF, Tab 14. There is also nothing in the record to support the appellant's allegation that the administrative judge told her that arbitration would take 10 years, and in any case the appellant has not explained how that statement would have led her to withdraw her appeal.

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<sup>1</sup> To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must allege facts that, if proven, would show: (1) she was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was "arbitrary and capricious." *Tat v. U.S. Postal Service*, [109 M.S.P.R. 562](#), ¶ 12 (2008). Having found that the appellant made the requisite non-frivolous allegations, the administrative judge should have proceeded to find that the Board has jurisdiction over the appellant's restoration claim. However, we see no indication that the administrative judge's failure to decide the jurisdictional issue contributed to the appellant's decision to withdraw her appeal.

¶8 We therefore find that the administrative judge did not err in dismissing the appeal as withdrawn. *See Duncan v. Merit Systems Protection Board*, [795 F.2d 1000](#), 1002 (Fed. Cir. 1986). The appellant's change of mind, and her assertion that she withdrew her appeal out of frustration, do not constitute grounds for review. *See Jackson v. Office of Personnel Management*, [31 M.S.P.R. 501](#), 502 (1986). Furthermore, because the appeal was properly dismissed as withdrawn, we need not consider the appellant's claim that the administrative judge committed procedural error in denying her motion to compel or in failing to facilitate settlement. *Cf. Turner v. Department of Housing & Urban Development*, [12 M.S.P.R. 46](#), 47 (1982) (because the appellant had withdrawn his appeal, it was unnecessary to address his claim on petition for review that the administrative judge had improperly denied witnesses). Finally, the appellant has not submitted any new and material evidence on petition for review. Consequently, her petition does not meet the criteria for review under [5 C.F.R. § 1201.115](#).

The appellant's request to reopen her withdrawn appeal is denied.

¶9 To the extent the appellant's petition for review may be construed as a request to reopen her withdrawn appeal, we deny her request. The Board has authority to reopen, on its own motion, appeals in which it has rendered a final decision. [5 U.S.C. § 7701\(e\)\(1\)\(B\)](#); [5 C.F.R. § 1201.118](#). However, absent unusual circumstances, such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn. *Nahoney v. U.S. Postal Service*, [112 M.S.P.R. 93](#), ¶ 15 (2009). As discussed above, the appellant has neither introduced new evidence nor shown that her withdrawal was the result of misinformation. Nor do we discern any other extraordinary circumstances that might warrant reopening the appeal, such as an intervening court, Board, or OWCP decision, the discovery of fraud, or a potentially momentous change in the law. *See Crumpler v. Department of Defense*, [113 M.S.P.R. 94](#), ¶¶ 5-6 (2009); *Anthony v. Office of Personnel Management*, [70 M.S.P.R. 214](#), 219 (1996).

The appellant's petition for review will not be considered as a new appeal.

¶10 We note that in some cases where an appellant attempted to reinstate an appeal that was dismissed as withdrawn, the Board has treated the appellant's pleading as both a request to reopen the original appeal and as a new, late-filed appeal. This practice dates back to our decision in *Duncan v. U.S. Postal Service*, [29 M.S.P.R. 72](#) (1985). In *Duncan*, as here, the appellant's original appeal was dismissed after he notified the Board that he instead wished to pursue the negotiated grievance procedure. The grievance proceeded to arbitration, and the arbitrator dismissed the grievance, finding that the case was not arbitrable because Mr. Duncan had already appealed to the Board. The appellant then moved to reopen his Board appeal, whereupon the presiding official, i.e., administrative judge, issued a second decision, finding that he had no authority to consider the appellant's request.<sup>2</sup> Subsequently, the appellant petitioned for review of that second decision. In its published opinion, the full Board first noted that it was not precluded from exercising jurisdiction because [5 U.S.C. § 7121](#), which requires that an employee elect between a statutory appeal process and a negotiated grievance procedure, does not apply to the Postal Service, and the statutory and regulatory right of a preference eligible Postal Service employee to appeal to the Board cannot be limited by a collective bargaining agreement. *Id.* at 74 (citing *Hall v. U.S. Postal Service*, [26 M.S.P.R. 233](#) (1985)). Thus, notwithstanding his pursuit of the grievance process, Mr. Duncan retained the option to proceed before the Board, either by filing a new appeal or by establishing a basis for the Board to reopen its prior order dismissing his first appeal. *Id.* The Board then reasoned as follows:

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<sup>2</sup> While the Board has the statutory and regulatory authority to reopen, on its own motion, an appeal in which a final decision has been issued, administrative judges do not have that authority. [5 U.S.C. § 7701](#)(e)(1)(B); *Brewer v. Office of Personnel Management*, [75 M.S.P.R. 163](#), 166, *aff'd*, 124 F.3d 227 (Fed. Cir. 1997) (Table); [5 C.F.R. §§ 1201.112](#), 1201.118.

The Board finds, given presiding officials' limited scope of authority, [5 C.F.R. § 1201.112](#), that it is generally appropriate to treat requests for reconsideration of appellant-initiated dismissals as late-filed petitions for appeal and to determine whether good cause has been established for waiver of the filing deadline. In this case, however, because the presiding official examined the appeal only to determine if he had the authority to reopen it, we will address both possible sources of Board jurisdiction. We note that the same factors which bear on the propriety of reopening the first appeal will generally be relevant to a determination of whether to allow the late filing of the second. However, reviewing such cases as new appeals will allow presiding officials, in the first instance, to consider appellants' arguments.

*Id.* In other words, while the administrative judge lacked the authority to consider Mr. Duncan's request to reopen his original withdrawn appeal, the administrative judge did have the authority to consider the filing as a new appeal, albeit an untimely filed one. Thus, in a case where the appellant files a motion to reopen with an administrative judge, the Board's policy is to consider the filing as both a request to reopen, to be addressed by the full Board, and a new appeal, to be first addressed by the administrative judge. *See also Scott v. U.S. Postal Service*, [80 M.S.P.R. 581](#), ¶ 4 (1999); *Richards v. Department of the Navy*, [44 M.S.P.R. 6](#), 8 (1990).

¶11 Following *Duncan*, the Board issued its decision in *Nabors v. U.S. Postal Service*, [31 M.S.P.R. 656](#), 659 (1986), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table). Like Mr. Duncan, Mr. Nabors withdrew his initial Board appeal to proceed with a grievance, and his appeal was accordingly dismissed. In addition to his grievance, Mr. Nabors also filed a discrimination claim, and the resulting final agency decision included notice of Board appeal rights. Mr. Nabors then filed a second appeal with the regional office. The administrative judge dismissed the second appeal on various grounds, including an erroneous finding that [5 U.S.C. § 7121](#) precluded Mr. Nabors from appealing to the Board after pursuing the grievance procedure. Mr. Nabors petitioned for review of the initial decision that dismissed his second appeal, and the Board granted his petition,

finding that his election to pursue grievance procedures did not preclude him from filing a second appeal with the Board. *Id.* at 658. The Board went on to expand the holding of *Duncan* as follows:

The Board has determined that it is generally appropriate to treat requests for reconsideration of appellant-initiated dismissals of petitions for appeal as late-filed petitions for appeal and to determine whether good cause has been established for waiving the filing deadline. We find that the same analysis applies here where appellant has filed a second petition for appeal after withdrawing his first one.

*Nabors*, 31 M.S.P.R. at 659 (internal citation to *Duncan* omitted). In accordance with that finding, the Board went on to consider whether Mr. Nabors had established good cause for the late filing of his second appeal. *Id.* at 659-60. The Board has since followed the policy established in *Nabors* in numerous cases, not limited to the Postal Service. *See, e.g., Nahoney*, [112 M.S.P.R. 93](#), ¶ 10; *Gibson-Michaels v. Federal Deposit Insurance Corporation*, [111 M.S.P.R. 607](#), ¶ 10 (2009); *Robey v. U.S. Postal Service*, [105 M.S.P.R. 539](#), ¶ 11, *aff'd*, 253 F. App'x 933 (Fed. Cir. 2007).

¶12 In sum, *Duncan* and *Nabors* stand for the proposition that when an appellant whose initial appeal was dismissed as withdrawn seeks to renew her appeal at the regional level, whether by requesting reopening or filing a second appeal, and the matter the appellant seeks to appeal is within the Board's jurisdiction, the Board will treat the pleading below as a new appeal. Should that appeal be untimely filed, as will generally be the case, the burden is on the appellant to establish good cause for the delay.<sup>3</sup> We again affirm this policy, as it permits the administrative judge to address the appellant's arguments on timeliness, and possibly other issues, whereas the administrative judge would

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<sup>3</sup> We note that in some cases the second appeal may be timely filed, which would obviate the need for a showing of good cause.

lack the authority to do so were the pleading considered solely as a request to reopen.

¶13 The Board has on several occasions extended the holding of *Duncan* and *Nabors* to cases where, as here, the appellant did not file an additional pleading at the regional level, but instead elected to petition the Board for review of the initial decision that dismissed her appeal as withdrawn. *See, e.g., Vitello v. U.S. Postal Service*, [109 M.S.P.R. 647](#), ¶ 4 (2008) (considering a petition for review as a new appeal); *Zuhlke v. U.S. Postal Service*, [74 M.S.P.R. 401](#), 403-04 (1997) (same); *Lewis v. U.S. Postal Service*, [47 M.S.P.R. 228](#), 230-31 (1991) (same); *cf. Sainz v. Department of Justice*, [32 M.S.P.R. 678](#), 681 n.2, *aff'd*, 835 F.2d 870 (Fed. Cir. 1987) (Table) (treating appellant's request for reopening, filed directly with the Board, as a new, late-filed appeal). We find, however, that in such cases the rationale of *Duncan* and *Nabors* does not apply, and there is no basis for treating the appellant's petition for review as a new appeal.<sup>4</sup> Accordingly, we do not consider the appellant's petition for review as a new appeal and hereby overrule any Board precedent to the contrary.

#### ORDER

¶14 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\(c\)](#)).

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<sup>4</sup> The disposition of an appeal, including the question of whether the appeal should be dismissed as untimely filed, is in the first instance a matter to be decided by the administrative judge. *See* [5 C.F.R. §§ 1201.22\(c\)](#), 1201.111(b)(3). By contrast, a petition for review is, by regulation, a matter to be considered solely by the full Board. *See generally* 5 C.F.R. part 1201, subpart 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](http://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.