UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 65

Docket No. DC-0752-09-0674-I-1

Anthony R. Pradier,

Appellant,

v.

United States Postal Service,

Agency.

April 14, 2010

Gale R. Thames, Washington, D.C., for the appellant.

James Puchala, Esquire, Bala Cynwyd, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed his appeal of his removal for lack of jurisdiction. 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 discussed below, however, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118 and VACATE the ID. We have considered the appellant's PFR both as a request to reopen his first appeal of his removal that was dismissed as withdrawn on November 26, 2008, as well as a request to review the initial decision of his second appeal of that action. We

DENY the request for reopening and DISMISS the second appeal as untimely filed.

BACKGROUND

¶2 The agency separated the appellant from his position as a Postal Police Officer effective August 16, 2008, and he filed a timely Board appeal of his removal. *See* MSPB Docket No. DC-0752-09-0674-I-1, Initial Appeal File (IAF 2), Tab 2 at 1; *see also* MSPB Docket No. DC-0752-08-0766-I-1, Initial Appeal File (IAF 1), Tab 9, Exhibits (Exs.) 3, 8; *id.*, Tab 1. On November 26, 2008, the administrative judge dismissed the appeal after the appellant withdrew it. *See Pradier v. U.S. Postal Service*, MSPB Docket No. DC-0752-08-0766-I-1, slip op. at 1 (Initial Decision, Nov. 26, 2008), IAF 1, Tab 12. Neither party filed a timely PFR, and on December 31, 2008, the initial decision became final. *See id.* at 2. On July 7, 2009, the appellant filed the instant appeal, again challenging his August 16, 2008 removal by asserting that he was terminated for making false statements during a polygraph examination but that he was cleared of the charges at the center of the investigation on May 30, 2009. IAF 2, Tab 1 at 2-3, 5. He requested a hearing on his appeal. *Id.* at 2. The administrative judge issued a jurisdictional order, explaining that the Board may lack jurisdiction over his appeal because the appellant previously filed, and then withdrew, his first removal appeal and because of his status as a Postal Service employee. *See* IAF 2, Tab 2 at 1-2. The administrative judge gave the appellant 10 days from the date of her order to set forth circumstances in support of reinstating his appeal and in support of Board jurisdiction over his appeal as a Postal Service employee. *Id.* at 2. The appellant did not respond.

¶3 Without holding the requested hearing, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to submit evidence "of any unusual circumstances, such as misinformation or new and material evidence, which would cause the Board to reopen or reinstate his appeal"

following its withdrawal in 2008. IAF 2, Tab 4, ID at 2. She further found that, in any event, the record established in the appellant's first appeal demonstrated that the appellant was not a preference eligible, did not occupy a management or supervisory position, and was not engaged in personnel work in other than a purely nonconfidential clerical capacity. *Id.* Accordingly, she found that the appellant was not an "employee" under 5 U.S.C. § 7511(a)(1)(B)(ii) or 39 U.S.C. § 1005(a)(4)(A) and thus did not have the right to appeal his removal to the Board. ID at 2-3.

¶4 The appellant has filed a timely PFR, in which he challenges the merits of the removal action and asserts that he was not given notice of his right to appeal to the Board or informed of the time limits within which the appeal must be submitted. Petition for Review File (PFR File), Tab 1 at 1-2. The agency has filed a response in opposition. *Id.*, Tab 3. The Clerk's Office issued a show-cause order informing the appellant that his July 7, 2009 filing appeared to be an untimely second appeal of his removal, and providing him with an opportunity to show good cause for the delay. PFR File, Tab 5. The appellant and the agency have filed responses to the show-cause order. PFR File, Tabs 6, 8.

ANALYSIS

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

¶6 We reopen this case on our own motion, however, and vacate the ID because it is based, in part, on the administrative judge's determination that the appellant did not raise any factual allegations or produce any evidence to show that his prior appeal of his removal should be reinstated. *See* ID at 2. Administrative judges 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, 1201.118.

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

¶7 Generally, the withdrawal of an appeal is an act of finality that has the effect of removing the appeal from the Board's jurisdiction. *E.g., Duncan v. U.S. Postal Service*, 96 M.S.P.R. 448, ¶ 8 (2004). 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.*

¶8 The record shows, and the appellant does not dispute, that he voluntarily and unequivocally withdrew his first Board appeal. IAF 1, Tab 11 at 1; *see id.*, Tab 12 at 1. While he asserts that he withdrew his appeal "based on the fact that the factors that le[]d to his termination were resolved in his favor, and that the grounds for the termination . . . were removed," PFR File, Tab 1 at 1, he does not assert that the agency or the administrative judge misled him or misinformed him by suggesting that he could be reinstated if he was absolved of the charges leading to his separation, *cf. Taylor v. U.S. Postal Service*, 26 M.S.P.R. 241, 242 (1985) (appeal reinstated where withdrawal was predicated upon possible reliance upon misinformation from the Board's regional office); *Gray v. Office of Personnel Management*, 21 M.S.P.R. 78, 78-79 (1984) (after employee had withdrawn his appeal, case remanded for further consideration, in light of evidence that employee may have been misinformed by agency concerning his retirement options). Rather, he asserts that until he received the agency's July 22, 2009 letter informing him that he would not be reinstated he *assumed* that he would be reinstated. PFR File, Tab 6 at 1-2. Additionally, he cited May 30, 2009, as the date on which the agency investigation was resolved in his favor, *see* IAF 2, Tab 1 at 5; yet, he withdrew his original appeal six months earlier on November 17, 2008, *see* IAF 1, Tab 11 at 2. Accordingly, to the extent that the

appellant is asserting that his appeal should be reopened because he withdrew his original appeal under the mistaken belief that he would be reinstated when the agency cleared him of wrongdoing, his assertion is without merit. Moreover, he has not submitted any new and material evidence. Under these circumstances, we find no basis for reopening or reinstating the appellant's original appeal. *See Duncan*, 96 M.S.P.R. 448, ¶ 8.

The appellant has not shown good cause for the delay in filing the new appeal.

¶9 Where an appellant files a second appeal after withdrawing his first one, the Board must consider, as a threshold matter, whether good cause has been established for the filing deadline. *See, e.g.*, *Gibson-Michaels v. Federal Deposit Insurance Corporation*, 111 M.S.P.R. 607, ¶ 10 (2009); *McNeil v. U.S. Postal Service*, 98 M.S.P.R. 18, ¶ 8 (2004); *Nabors v. U.S. Postal Service*, 31 M.S.P.R. 656, 659 (1986), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table).[1] In this case, the appellant argues on PFR that his appeal should be considered timely. PFR File, Tab 6 at 1-2. He asserts that the agency never provided him with notice of his Board appeal rights or the time limits within which a Board appeal must be filed. *See id.*, Tab 1 at 2; *see also* IAF 1, Tab 9, Ex. 8. An agency is obligated to notify an employee of his appeal rights when it takes an action the employee may appeal to the Board. *Carroll v. U.S. Postal Service*, 87 M.S.P.R. 570, ¶ 6 (2001).

¶10 The agency in this case did not provide any appeal rights notice to the appellant.[2] *See* IAF 1, Tab 4 at 5-6. In some cases such as this, where the

---

[1] This case, which involves an appellant who withdrew his first appeal and filed a second appeal with the regional office, is distinguishable from *Lincoln v. U.S. Postal Service*, 2010 MSPB 64 (April 14, 2010), where the appellant withdrew his first appeal and filed a timely petition for review of the initial decision dismissing his appeal. In that case, the Board will examine whether the withdrawal is voluntary, i.e., clear, decisive, and unequivocal. *See Lincoln*, 2010 MSPB 64, ¶ 7 (citing *Page v. Department of Transportation*, 110 M.S.P.R. 492, ¶ 5 (2009)).

[2] The agency has taken the position that the appellant was not entitled to appeal his removal to the Board. IAF 1, Tab 7, Agency's Response at 2-4. Based on our

appellant claims he has appeal rights, where the agency has provided him with no notice of any such rights, and where he has filed an untimely appeal, the Board has found that the jurisdictional and timeliness issues are "inextricably intertwined," that is, resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. *See Petric v. Office of Personnel Management*, 108 M.S.P.R. 342, ¶¶ 2, 6 (2008). In those cases, the Board has held that jurisdiction should be addressed before timeliness. *Id.*, ¶ 6. Here, however, the appellant filed a timely appeal after his separation despite the agency's failure to notify him of his appeal rights. The threshold question here, therefore, is not jurisdiction, but timeliness. *See Tanner v. U.S. Postal Service*, 94 M.S.P.R. 417, ¶ 17 n.* (2003).

¶11 To establish good cause for the untimely filing of an appeal, a party must show that he 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).

¶12 The appellant argues that he filed his second appeal late because he was waiting to be cleared of any wrongdoing by the agency. PFR File, Tab 6. As noted, he stated in his second appeal that he was cleared of the charges as of May 30, 2009. IAF 2, Tab 1 at 5. He further stated that he made a number of calls to the agency and made written requests seeking information as to his status, but received no reply. *Id.* Yet he did not file his second appeal until July 7, 2009. IAF 2, Tab 1. We find that waiting five weeks, under these circumstances, does not evidence due diligence or ordinary prudence, even assuming that there is good cause for the delay prior to May 30, 2009. *Cf. Staton v. Department of Homeland Security*, 103 M.S.P.R. 318, ¶ 12 (2006) (delay in pursuing a Board

---

disposition of this appeal, we make no findings on the correctness of the agency's position.

appeal while the appellant informally attempted to resolve the matter with the agency did not constitute good cause for filing delay).

¶13 The appellant also argues that he timely filed his second appeal from a July 22, 2009 agency letter informing him that he would not be reinstated. PFR File, Tab 6. He has not submitted that letter into the record. In any event, we find this argument unavailing since he filed his second appeal on July 7, 2009, before he received the agency's letter.

¶14 Finally, the appellant argues that the agency never provided him with notice of Board appeal rights or the time limits within which a Board appeal must be filed. PFR File, Tab 1 at 2. While true, the fact remains that, notwithstanding, he timely filed his first appeal with the Board. We find, therefore, under the circumstances of this case, that this argument does not support a finding of good cause for the substantial (10 months) untimeliness of the appellant's second appeal.

¶15 The appellant's appeal is DISMISSED as untimely filed.

ORDER

¶16 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:

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