UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 156

Docket No. SF-0752-09-0788-I-1

Trevor L. Dunbar,

Appellant,

v.

United States Postal Service,

Agency.

July 28, 2010

Edward J. Alcantar, Emeryville, California, for the appellant.

Larry F. Estrada, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal as untimely filed. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant was a preference eligible Mail Handler for the agency. Initial Appeal File (IAF), Tab 1 at 2, Tab 7, Subtab 1. By letter dated May 19,

2009, the agency notified the appellant of its decision to remove him effective June 6, 2009. IAF, Tab 7, Subtab 3.

¶3 On July 16, 2009, the appellant filed a Board appeal of his removal and requested a hearing. IAF, Tab 1 at 1, 8. The administrative judge issued an acknowledgment order, directing the appellant to file evidence and argument to show that his appeal was timely filed or that good cause existed for the delay. IAF, Tab 2 at 2. The appellant responded, alleging that the agency's decision letter did not reach his post office box until June 25, 2009. IAF, Tab 6 at 4. The agency also responded, submitting evidence that it sent copies of the letter to the appellant's post office box by certified mail and delivery confirmation.[1] IAF, Tab 7, Subtab 4. The agency alleged, among other things, that its letter reached the appellant's post office box no later than May 28, 2009,[2] IAF, Tab 7 at 4-5, 7, Subtabs 4-6, and that the appellant's union filed a grievance on June 2, 2009, indicating that the appellant had given the union a copy of the decision letter on or before that date, IAF, Tab 7 at 7-8, Subtab 7.

¶4 Without holding a hearing, the administrative judge issued an initial decision dismissing the appeal as untimely filed. IAF, Tab 10, Initial Decision (ID) at 1, 5. He found that "the evidence suggests that the appellant was aware of the removal letter at least as of June 2, 2009." ID at 3. The administrative judge also found that, even if the appellant were not aware of the decision letter as of

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[1] The post office box was in the retail area of the facility in which the appellant worked. IAF, Tab 7, Subtab 5 at 2. The agency's decision letter states that the appellant had been absent from work since January 30, 2009. *Id.*, Subtab 3 at 1.

[2] The agency filed evidence and argument pertaining to alleged irregularities in recording the delivery of the two copies of the decision letter that it sent to the appellant. IAF, Tab 7 at 3-5, Subtabs 4-6. Thus, the agency asserted that the copies were probably delivered to the appellant's post office box on May 21, 2009, but that it could only definitively demonstrate delivery as of May 28, 2009. IAF, Tab 7 at 4, 7, Subtab 6.

that date, he failed to exercise due diligence in collecting his mail and thus failed to show good cause for the filing delay. ID at 4-5.

¶5 The appellant has filed a petition for review, arguing that his removal did not become effective until well after June 6, 2009, that the union grievance concerned the notice of proposed removal rather than the final removal decision, and that an agency official tampered with the decision letter to prevent him from receiving it in a timely manner. Petition for Review File (PFR File), Tab 1 at 4-5. The agency has not filed a response.

ANALYSIS

¶6 Generally, an appellant must file his appeal no later than 30 days after the effective date of the action being appealed, or 30 days after the date he receives the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The appellant bears the burden of proving either that his appeal was timely, or that good cause existed for the delay. *Turner v. U.S. Postal Service*, 90 M.S.P.R. 385, ¶ 9 (2001); 5 C.F.R. § 1201.22(c).

¶7 The basis for the initial decision is unclear to the extent that the administrative judge did not explicitly identify the precise deadline for filing the initial appeal. However, it appears that the administrative judge found that the decision letter was delivered to the appellant's post office box before the June 6, 2009 removal date identified in the letter, and that the appellant should be deemed to have received the letter when it was delivered because the appellant was negligent in collecting his mail. ID at 3-4; IAF, Tab 7, Subtab 3 at 1. Thus, the administrative judge effectively charged the appellant with constructive receipt based on his alleged negligence in collecting his mail.

¶8 However, both the Board and the United States Court of Appeals for the Federal Circuit have found that, under the Board's regulations, an appellant cannot be charged with constructive receipt of an agency decision letter on the basis that the appellant was negligent in collecting his mail. *Hamilton v. Merit*

Systems Protection Board, 75 F.3d 639, 647, n.9 (Fed. Cir. 1996) (the appellant could not be charged with constructive receipt on the basis that he unreasonably delayed in collecting his mail); *Saddler v. Department of the Army*, 68 F.3d 1357, 1359 (Fed. Cir. 1995) (although the appellant's own negligence prevented him from receiving the agency's decision in a timely manner, this provided no basis for constructive receipt); *Cody v. Department of the Navy*, 104 M.S.P.R. 161, ¶ 13 (2006) (whether the appellant was negligent in picking up her mail was immaterial to the timeliness issue under the Board's regulations). Under the plain language of the Board's regulations, the date that an appellant actually receives the agency's decision letter is the relevant date for determining the filing deadline – not the date that it was delivered to his address of record.[3] 5 C.F.R. § 1201.22. Nor does the governing regulation require an appellant to exercise diligence in receiving the agency's decision. *See id.*; *see also Saddler*, 68 F.3d at 1359 ("[W]e do not believe that the [B]oard can dismiss an appeal as untimely when it has been filed in compliance with the literal requirements of the regulation."). We therefore find that the administrative judge erred in dismissing the appeal as untimely filed on the grounds stated in the initial decision. ID at 3-5.

¶9 The Board is unable to decide the timeliness issue on review because there are several disputes of material fact that cannot be resolved on the existing record. Specifically, the date that the appellant actually received the agency's decision letter, and the issue of whether the appellant intentionally avoided receiving the decision letter, remain in dispute. IAF, Tab 1 at 2, Tab 6 at 4, Tab 7 at 8, Subtabs 2-3, 7; PFR File, Tab 1 at 4-5; *see Saddler*, 68 F.3d at 1359

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[3] Under Board precedent, an individual may be deemed to have constructively received a document for the purposes of triggering a filing period when the document was received by a relative of that individual at the individual's address of record. *See, e.g.*, *White v. Department of Justice*, 103 M.S.P.R. 312, ¶¶ 3, 9 (2006) (receipt by the appellant's mother-in-law at the appellant's residence), *aff'd*, 230 F. App'x 976 (Fed. Cir. 2007). The record in the instant appeal does not implicate this line of cases.

(indicating that an appellant may be charged with constructive receipt of a document that he intentionally avoided receiving); *Horton v. Department of the Navy*, 105 M.S.P.R. 332, ¶ 11 (2007). In addition, the appellant has submitted on review what he argues is new and material evidence showing that his appeal was timely filed because his removal did not become effective until after he filed his appeal. PFR File, Tab 1 at 4, 7. *But see Hopkins v. U.S. Postal Service*, 108 M.S.P.R. 25, ¶ 9 (2008) (under certain circumstances, a Postal Service employee's removal is constructively effective on the date contained in the decision letter rather than the date the employee was actually separated from the rolls); *McGarrity v. U.S. Postal Service*, 103 M.S.P.R. 610, ¶ 9 (2006) (same); *McNeil v. U.S. Postal Service*, 98 M.S.P.R. 18, ¶ 9 (2004) (same).

¶10 Because the appellant has established genuine factual disputes on these matters and requested a hearing, the agency's documentary submissions may not be dispositive, and the appellant is entitled to an evidentiary hearing on the timeliness issue.[4] *See Hamilton v. U.S. Postal Service*, 79 M.S.P.R. 354, 357 (1998). We therefore find that the administrative judge erred in finding the appellant's allegations "not convincing" without first affording him such a hearing. ID at 4. On remand, the administrative judge shall resolve these issues as appropriate after affording the appellant an evidentiary hearing on the timeliness issue.

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[4] The dissent correctly states that the record contains some evidence suggesting the appellant's union representative received the removal decision in a timely fashion. However, we believe additional, contradictory evidence creates disputes of material fact on the timeliness issue. *See* IAF, Tab 1, Enclosure (Step 2 Grievance challenges "proposal to remove"); Tab 7 at 6 (agency alleges it sent decision letter only to the appellant); Tab 7, Subtab 7 (Step 1 Grievance alleges improper "proposal to remove").

ORDER

¶11 Accordingly, we REMAND the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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

DISSENTING OPINION OF MARY M. ROSE

in

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¶1 The Opinion and Order in this timeliness case applies *Saddler v. Department of the Army*, 68 F.3d 1357, 1359 (Fed. Cir. 1995) to find that the administrative judge erred by finding that the appellant constructively received the agency's decision notice based on his failure to timely pick up his mail. *Saddler* does not entirely eliminate the constructive receipt doctrine. In fact, it explicitly identifies three situations in which constructive receipt would still apply: Where the appellant's designated union representative receives the decision notice; where the notice is delivered to a relative at the appellant's residence; and where there is evidence of intentional avoidance. *Id.* at 1359. In this case, the appellant's designated union representative clearly received a copy of the decision notice because the record contains a grievance over the removal action that the union filed on the appellant's behalf. Initial Appeal File, Tab 7, Subtab 7. The appellant contends that the grievance concerns only the notice of proposed removal, but the grievance on its face was filed *after* the agency issued its decision to remove the appellant and the remedy requested by the union was rescission of the removal action. *Id.* I would find that the grievance concerned the removal action and that the grievance shows that the appellant's union representative received the decision notice in a timely fashion. Therefore, this case falls within one of the three situations contemplated by *Saddler* and the administrative judge's application of the constructive receipt doctrine was appropriate and consistent with precedent.

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Mary M. Rose
Member