UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 174

Docket No. PH-0752-10-0175-I-1

Donald Shapiro,

Appellant,

v.

Department of Veterans Affairs,

Agency.

August 24, 2010

Yolanda Riggsbee, Wilkes Barre, Pennsylvania, and Jerry J. Weinberger, Esquire, Scranton, Pennsylvania, for the appellant.

Director, Wilkes-Barre Department of Veterans Affairs Medical Center, Wilkes Barre, 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¶1 The appellant has petitioned for review of the initial decision that dismissed his appeal as withdrawn. For the reasons set forth below, we GRANT the petition, VACATE the initial decision, REINSTATE the appeal, and REMAND the appeal to the Northeastern Regional Office for further adjudication.

BACKGROUND

¶2 The appellant is a physician in the Department of Hematology and Oncology at the Wilkes-Barre Department of Veterans Affairs Medical Center (VAMC). Initial Appeal File (IAF), Tab 1 at 2, 18. The agency informed the appellant that he was required to report for a fitness-for-duty examination on November 18 and 20, 2009. *Id*. at 31-32. By letter dated December 21, 2009, the agency informed the appellant that, based on the report by the examining physician, it was necessary to convene a physical standards board to determine his continued fitness for duty, and that effective immediately he would be placed on enforced leave pending that determination. IAF, Tab 1 at 18-19. The letter further stated that, if the period of enforced leave should extend for a period beyond 14 days, the appellant would have the right to appeal the enforced leave action to the Board as a constructive suspension. *Id*.

¶3 On January 12, 2010, the appellant, represented by an attorney, filed a Board appeal of the agency's enforced leave action. IAF, Tab 1. The appellant stated that he was preparing for the physical standards board and that in the meantime he should "continue being compensated without having to use all of [his] voluntary leave time." *Id*. at 6. He also indicated on the appeal form that he had "filed with the EOC [sic] based upon discrimination regarding age and religion." *Id*. at 11. On January 22, 2010, the appellant designated a union representative and also submitted a letter to the administrative judge, stating as follows:

> I wish to rescind my Merit Systems Protection Board appeal of January 12, 2010. This issue is in process of review by Office of Resolution Management since November 30, 2009. I filed the appeal to be timely in accordance with deadline instructions from the Agency. I now understand that this filing is in error. I do not wish to pursue this issue through your appeals process and wish to remain with the Office of Resolution Management.

IAF, Tab 4. The administrative judge spoke with appellant's attorney by telephone, IAF, Tab 6 at 2, and on January 28, 2010, the appellant's attorney submitted a letter stating as follows:

> This shall confirm that the appeal No. 201-000-132[1] on behalf of Dr. Donald Shapiro has been withdrawn. As I stated in our conversation of today, Dr. Shapiro has filed an appeal through EEO and will be represented by his local union.

IAF, Tab 5.

¶4 Based on his communications with the appellant and his attorney, the administrative judge dismissed the appeal as withdrawn. IAF, Tab 6 (Initial Decision, Feb. 1, 2010). The administrative judge explained that, under 5 C.F.R. § 1201.154, when an appellant files a timely formal discrimination complaint with the agency prior to appealing to the Board, the right to appeal to the Board does not vest until the agency issues a final decision on the discrimination complaint or 120 days elapse from the date the complaint is filed with the agency. *Id*. at 2 n.2. The administrative judge noted that the appellant had not specifically alleged that he filed a timely formal discrimination complaint with the agency. *Id*. However, the administrative judge indicated that if the appellant had filed a timely formal complaint, he could file a new Board appeal when his appeal rights vested, and that appeal would be adjudicated if it was timely filed and within the Board's jurisdiction. *Id*.

¶5 On petition for review, the appellant states that he withdrew his Board appeal based on his mistaken belief that the appeal was erroneously filed because of his prior interaction with the agency's Office of Resolution Management. Petition for Review (PFR) File, Tab 1 at 3. Attached to the petition is a copy of the final agency decision, dated February 9, 2010, dismissing the appellant's January 25, 2010 formal equal employment opportunity (EEO) complaint, which alleged age and disability discrimination in connection with his placement on

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[1] This is the number on the e-Appeal form. *See* IAF, Tab 1.

leave. *Id*. at 4-7. The final agency decision explains that because the appellant had already filed a Board appeal when he filed his formal EEO complaint, his election to proceed before the Board was binding and irrevocable, notwithstanding the subsequent withdrawal of his appeal. *Id*.

ANALYSIS

¶6 Generally, an appellant's withdrawal of an appeal is an act of finality that has the effect of removing the appeal from the Board's jurisdiction. *Lincoln v. U.S. Postal Service*, 113 M.S.P.R. 486, ¶ 7 (2010). In the absence of unusual circumstances, the Board will not reinstate an appeal once it has been withdrawn. *Nazario v. Department of Justice*, 108 M.S.P.R. 468, ¶ 4 (2008). However, the Board may relieve the appellant of the consequences of his decision to withdraw the appeal where the decision was based on incorrect or misleading information. *Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 5 (2005); *Brooks v. Department of the Army*, 67 M.S.P.R. 551, 553 (1995); *Scarboro v. Department of the Navy*, 55 M.S.P.R. 494, 497 (1992). In this case, it appears the appellant's decision to withdraw was the result of a misunderstanding concerning "mixed case" procedures.

¶7 A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Board. 29 C.F.R. § 1614.302(a)(1). A mixed case appeal is an appeal filed with the Board, pursuant to 5 C.F.R. part 1201, subpart E, alleging that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information. 29 C.F.R. § 1614.302(a)(2). When an employee who has been affected by an action that is appealable to the Board believes that the action was the result of prohibited discrimination, he must elect between filing a mixed case complaint with the agency or filing a mixed case appeal directly with

the Board, and whichever is filed first is considered an election to proceed in that forum. 5 C.F.R. § 1201.154; 29 C.F.R. § 1614.302(b); *see Duffy v. U.S. Postal Service*, 93 M.S.P.R. 405, ¶ 6 (2003). The same applies to claims of prohibited discrimination stemming from alleged constructive actions.[2] *See Social Security Administration v. Harty*, 96 M.S.P.R. 65, ¶ 15 (2004); *Ball v. Department of Veterans Affairs*, 68 M.S.P.R. 482, 484 (1995). Once a complainant elects to proceed before the Board, the withdrawal of his Board appeal does not negate his prior election. *Sanchez v. O'Neill*, EEOC Appeal No. 01A12164, 2001 WL 683031 at *1 (EEOC May 24, 2001).

¶8 The final agency decision indicates that the appellant first sought EEO counseling on November 6, 2009, after he was instructed to report for a fitness-for-duty examination. PFR File, Tab 1 at 4. On November 30, 2009, the appellant and his union representative signed a "Notice of Rights and Responsibilities" letter, which included notification that where a claim that can be appealed to the Board involves an issue of discrimination, a complainant may file either a mixed case complaint or mixed case appeal, but not both. *Id*. at 4 n.2. The counseling process concluded on January 11, 2010, and on January 12, 2010, the day the appellant filed his Board appeal, the appellant and his union representative received a "Notice of Right to File a Discrimination Complaint." *Id*. at 4. In his January 22, 2010 withdrawal letter, the appellant indicated that his

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[2] An employee's placement on enforced leave for more than 14 days, pending the agency's inquiry into his physical ability to perform, is a constructive suspension within the Board's jurisdiction. *Pittman v. Merit Systems Protection Board*, 832 F.2d 598, 599-600 (Fed. Cir. 1987). Placement on administrative leave with pay is not an appealable action, however. *Henry v. Department of the Navy*, 902 F.2d 949, 953-54 (Fed. Cir. 1990). While the appellant asserts that he has been forced to expend "voluntary leave" pending the decision of the Physical Standards Board, the final agency decision suggests that he may have been placed on administrative leave. *Compare* IAF, Tab 1 at 6, *with* PFR File, Tab 1 at 4. Given this discrepancy, we cannot as yet determine whether the agency subjected the appellant to an appealable action within the Board's jurisdiction.

discrimination claim had been "in process of review" by the agency's Office of Resolution Management since November 30, 2009, and that he "now under[stood]" that his Board filing was "in error." IAF, Tab 4 at 2. However, as of January 22, 2010, the appellant had yet to file a formal mixed case complaint. Because he had already filed his Board appeal, thereby electing to proceed in that forum, it was the Board, not the agency, that was the only viable forum for his mixed case.

¶9 In light of the above, it appears the appellant withdrew his appeal based on the belief that what had thus far been informal EEO activity constituted a binding election to proceed before the agency. Had the administrative judge inquired whether the appellant filed a formal mixed case complaint prior to his Board appeal, he could have corrected the appellant's misapprehension, but the administrative judge did not take that opportunity. Under these circumstances, we find that reinstatement of the appeal is appropriate. *See Brooks*, 67 M.S.P.R. at 554 (reinstating a withdrawn appeal where the administrative judge was in a position to correct appellant's mistaken belief that she could appeal to the Equal Employment Opportunity Commission); *Scarboro*, 55 M.S.P.R. at 498 (reinstating a withdrawn appeal where the administrative judge had an opportunity to correct the appellant's mistaken belief that the Board lacked jurisdiction); *Dodd v. Department of the Interior*, 48 M.S.P.R. 582, 585 (1991) (reinstating a withdrawn appeal where the administrative judge had an opportunity to correct the appellant's mistaken belief that his choices were limited to an oral hearing or withdrawal).

ORDER

¶10 Accordingly, we VACATE the initial decision and REMAND the appeal to the Northeastern Regional Office for further adjudication.

FOR THE BOARD:

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