UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 237

Docket No. AT-0752-10-0284-I-1

Ricky Williams,

Appellant,

v.

United States Postal Service,

Agency.

December 8, 2010

Ricky Williams, Jackson, Mississippi, pro se.

Jennifer C. Kellett, Esquire, Memphis, Tennessee, 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 timely petition for review of the January 28, 2010 initial decision, which dismissed his appeal as untimely filed. We DENY the petition 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 the appeal on the Board's own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant, a preference eligible, from his position as a Mail Handler for absence without leave and failure to be in regular attendance, effective June 27, 2008. Initial Appeal File (IAF), Tab 5, Exhibit (Ex.) C at 2-3. The agency's June 12, 2008 decision letter informed the appellant that he could file an appeal with the Board within 30 days of the effective date of his removal. *Id.* at 3.

¶3 On or about June 18, 2008, the appellant filed a document with the Equal Employment Opportunity Commission (EEOC) entitled "Complaintant [sic] proposed amended finding of facts," to which he attached, inter alia, the decision letter. *Id.* at 1-4. The EEOC construed the document as a motion to amend a previous discrimination complaint the appellant had filed regarding a letter of warning and a 14-day suspension, to include allegations concerning his removal. IAF, Tab 5, Exs. A, D at 1. By order dated August 1, 2008, an EEOC administrative judge granted the motion to amend the complaint and returned the case to the agency. *Id.*, Ex. D. In the order, the EEOC administrative judge noted that she conducted a status conference concerning the appellant's motion, and the parties indicated that they "understood that if the removal claim was added . . . the case would become a mixed case complaint." *Id.* at 1. On November 18, 2008, the agency issued its Final Agency Decision (FAD) on the portion of the appellant's EEO complaint concerning the removal, finding no discrimination.[1] IAF, Tab 5, Ex. E at 1, 20-21. The FAD advised the appellant

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[1] The FAD noted that, although the appellant's pending case had been amended to include his claim that he was discriminated against when he was issued the letter of decision removing him, making the complaint a mixed case, the agency thereafter "severed the Letter of Decision issue from the complainant's pending case, assigned it a separate case number, and investigated that claim. . . . This is the [FAD] in that case." IAF, Tab 5, Ex. E at 1 n.1; *see also id.*, Tab 1 at 18-19 (agency letter to the EEOC administrative judge stating that it "believes that it must process the complainant's removal as a mixed case under a separate number"). Thus, the FAD concerns only the appellant's claims relating to his removal.

that he "may appeal this decision to the Merit Systems Protection Board, **not the Equal Employment Opportunity Commission,**" within 30 days of receipt or, in lieu of a Board appeal, he could file a civil action in the appropriate United States District Court.[2] *Id*. (emphasis in original).

¶4 On November 28, 2008, the appellant filed with the EEOC a request for a hearing before an EEOC administrative judge. IAF, Tab 5, Ex. G. On December 19, 2008, an EEOC administrative judge issued an acknowledgment order based on the appellant's request for a hearing. *Id.*, Ex. H. On February 9, 2009, the EEOC's Office of Federal Operations (OFO) acknowledged that it had received an appeal from the appellant on December 15, 2008.[3] *Id.*, Ex. F. Then, on March 31, 2009, the EEOC administrative judge dismissed the request for a hearing, noting that the agency had issued a FAD on the underlying EEO complaint as a mixed case complaint, and determining that "[d]uring the pendency of the appeal to the [OFO], the Complainant does not have the right to request a hearing on the underlying EEO complaint with this office." *Id.*, Ex. I at 1-2. On April 14, 2009, the OFO dismissed the appellant's appeal, finding that it lacked jurisdiction over the matter, and stating that "the agency clearly advised complainant at the end of the [FAD] that he must file an appeal with the MSPB, and 'not the Equal Employment Opportunity Commission.'" *Id.*, Ex. J at 1. The appellant sought reconsideration of the OFO decision, which was denied on December 15, 2009. *Id.*, Ex. K.

¶5 The appellant filed a removal appeal with the Board on December 29, 2009. IAF, Tab 1. The Board administrative judge issued an order advising

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[2] Title 5 of the United States Code, § 7702(a)(2) provides that, in any matter before an agency involving an action that is appealable to the Board and where discrimination has been alleged as a basis for the action, the agency's decision on the discrimination issue "shall be a judicially reviewable action unless the employee appeals the matter to the Board . . . ."

[3] The appellant's EEOC appeal form is not part of the record below.

the appellant, inter alia, that his appeal appeared to be untimely filed by 520 days, but also noting that "an appellant who was subject to an action that is appealable to the Board and who filed a timely formal discrimination with the agency, may file an appeal . . . within 30 days after receipt of the [FAD]," and ordering him to show cause why his appeal should not be dismissed as untimely filed. IAF, Tab 3 at 1-4. The agency moved to dismiss the appeal on the grounds that it was untimely because the appellant filed it more than 30 days after he received the FAD, and the appellant thereafter filed responses to the administrative judge's show cause order and to the agency's motion to dismiss. IAF, Tab 5 at 4-6, Tabs 6-7.

¶6 The administrative judge dismissed the appeal as untimely filed, stating that the appellant had been given clear instructions concerning his appeal rights, but that he nonetheless failed to establish good cause for his late filing because he failed to explain why he did not heed the agency's and the EEOC's instruction to file an appeal with the Board. IAF, Tab 8, Initial Decision at 3. The appellant has filed a petition for review. Petition for Review File, Tab 1.

ANALYSIS

¶7 An employee who files a timely formal complaint of discrimination with his employing agency regarding a matter that is within the Board's jurisdiction may also file an appeal with the Board. For such an appeal to be considered timely, it must be filed within 30 days after the employee receives the FAD. 5 C.F.R. § 1201.154(b). If an appellant fails to timely submit his appeal, it will be dismissed as untimely filed absent a showing of good cause for the delay in filing. 5 C.F.R. § 1201.22(c). The appellant bears the burden of proof with regard to timeliness, which he must establish by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(ii).

¶8 Here, the agency issued the FAD on November 18, 2008. IAF, Tab 5, Ex. E at 21. Presumably, the appellant received it soon thereafter. *Cf.* 5 C.F.R.

§ 1201.4(1) (stating that, absent other evidence, a submission to the Board is presumed to have been mailed 5 business days before receipt). Thus, the appellant was required to file his Board appeal by approximately December 23, 2008.

¶9 As stated above, there is no dispute that the EEOC's OFO received an appeal from the appellant on December 15, 2008. Further, the EEOC's orders of dismissal indicated that the December 15, 2008 submission was docketed as an appeal of the November 18, 2008 FAD that upheld the appellant's removal. IAF, Tab 5, Exs. E-F, I-J.

¶10 The Board has held that, in accordance with 5 U.S.C. § 7702(f),[4] it must consider timely an appeal in a mixed case that was filed on time but with an agency other than the Board. *Brent v. Department of Justice*, 100 M.S.P.R. 586, ¶ 7 (2005), *aff'd*, 213 F. App'x 993 (Fed. Cir. 2007); *Wood v. Department of Defense*, 71 M.S.P.R. 104, 106 (1996). Thus, under the circumstances of this case, we find that the appellant's submission of his appeal to the OFO on December 15, 2008 must be considered a timely filing with the Board of an appeal from the November 18, 2008 FAD. Thus, we reverse the initial decision finding the appeal untimely filed.

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[4] Title 5 of the United States Code, § 7702(f) provides:

> In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

ORDER

¶11 Accordingly, we remand this case to the Atlanta Regional Office for adjudication on the merits.[5]

FOR THE BOARD:

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

[5] On September 7, 2010, the appellant submitted an additional Board appeal form challenging his removal, which he claims was effective either August 12 or 21, 2010. PFR File, Tab 3 at 2, 7. He states therein that he would like the Board to "consider this action when [a] decision on Docket No. AT-0752-10-0284-I-1 is given." *Id.* at 3. He also attaches various documents to this submission, including pleadings from his proceedings before the EEOC and agency forms documenting various personnel actions. *Id.* at 8-49. Because it is unclear from the appellant's submission whether it should be docketed as a separate appeal or should be considered as part of the instant appeal, we forward it to the administrative judge for further processing as may be appropriate.