UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARRINGTON L. MYVETT, Appellant, v. COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR DC, Agency.	DOCKET NUMBER DC-0752-12-0189-I-1 DATE: January 14, 2013

THIS ORDER IS NONPRECEDENTIAL*

Barrington L. Myvett, Washington, D.C., pro se.

Larry G. Ward, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge, which dismissed this appeal as untimely filed with no good cause shown. For the

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

The following facts are undisputed. The appellant, while employed as a GS-6 Drug Testing Technician, filed a formal complaint of discrimination in which he claimed that the agency had taken several actions, including proposing his removal, because of his sex and in retaliation for his previous equal employment opportunity (EEO) activity. Initial Appeal File (IAF), Tab 6 at 16 (Exhibit (Ex.) C). On May 13, 2008, the agency issued a decision notifying the appellant that he would be removed effective May 16, 2008. *Id*. at 8 (Ex. A). The decision informed the appellant that he could appeal the removal to the Board within 30 days of the effective date. *Id*. at 13. The decision further informed the appellant that, if he believed that the removal was the result of unlawful discrimination, he had the option of filing a discrimination complaint with the agency's EEO Director. *Id*.

On June 2, 2008, before the 30-day period for appealing his removal to the Board had expired, the appellant filed a motion with the Equal Employment Opportunity Commission (EEOC) Administrative Judge (AJ) who had been assigned to hold a hearing on his EEO complaint to amend the complaint to include the agency's decision to remove him. *Id*. at 15 (Ex. B). The EEOC AJ denied the motion. *Id*. at 5. The appellant appealed that ruling to the EEOC which affirmed it. *Myvett v. Poteat*, No. 0120103671, 2011 EEOPUB Lexis 3826 (Nov. 21, 2011).

The appellant filed this appeal on December 23, 2011, within 30 days of the date that he alleges he received the EEOC's decision. He alleged on the appeal form, inter alia, that the agency removed him in retaliation for his earlier EEO activity. IAF, Tab 1 at 5; *see also* Tab 6 at 5. The AJ found that the appeal is within the Board's jurisdiction but dismissed it as untimely filed with no good

cause shown. She found, in relevant part, that the appellant received clear notice of his appeal rights and that he did not act with due diligence in pursuing them. IAF, Tab 14.

The appellant has filed a timely petition for review. Petition for Review File, Tab 1. The agency has not responded to the petition for review.

DISCUSSION

In a recent decision, the Supreme Court explained that the Civil Service Reform Act (CSRA) provides several paths for an employee to challenge a personnel action and that the availability of a particular path depends on the severity of the personnel action and whether the employee claims that the action constituted discrimination. When an employee is removed and claims discrimination, he may appeal the action directly to the Board or file a complaint of discrimination with his employing agency. *Kloeckner v. Solis*, 133 S. Ct. 596, 184 L. Ed. 2d 433, 440 (2012); *see* 5 U.S.C. §§ 7512, 7513; 29 C.F.R. § 1614.302. The Court noted that, under some circumstances, an EEOC AJ may permit an employee who is removed after having already filed a discrimination complaint concerning other issues to amend his complaint to encompass the removal. *Kloeckner*, 184 L. Ed. 2d at 442. The Court observed that neither the CSRA nor any regulation authorizes such a procedure, and it cited as general background the decision mentioned above in which the EEOC affirmed its AJ's determination not to allow the appellant herein to amend his discrimination complaint to encompass his removal. *Id.* at 442 n.2.

Whether the EEOC AJ should have permitted the appellant to amend his discrimination complaint is not before us as we lack the power to review an EEOC AJ's ruling. Instead, the question is whether this appeal may proceed given that the appellant made his first submission to the Board more than 3 years after the 30-day deadline. *See* 5 C.F.R. § 1201.22(b). We find that it can.

Our analysis is based on the mixed-case statute which sets forth procedures for cases in which an individual is affected by an action that is appealable to the Board and claims that the action constituted unlawful discrimination or retaliation for participating in the process for seeking redress for discrimination. 5 U.S.C. § 7702(a)(1); *Martin v. Department of the Air Force*, 73 M.S.P.R. 590, 594 (1997). The agency does not contest the AJ's finding that the appellant has the right to appeal his removal under 5 U.S.C. §§ 7512(1) & 7513(b), and the appellant alleges that the removal was in retaliation for his prior participation in the EEO process. This case is therefore governed by section 7702.

With regard to the timeliness issue, section 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.

For purposes of the above provision, whether an individual was confused about potential avenues of appeal is irrelevant; all that is required is that the individual file a timely appeal with the wrong agency. *Miller v. Department of the Army*, 987 F.2d 1552, 1555 (Fed. Cir. 1993). In *Williams v. U.S. Postal Service*, 115 M.S.P.R. 318, ¶¶ 3, 4 (2010), the appellant attempted to appeal the final agency decision on his mixed-case complaint (which concerned his removal) within the period for filing a Board appeal, but he did so in a submission to the EEOC. An EEOC AJ concluded that he could not consider the matter; the EEOC affirmed this determination and denied the appellant's request for reconsideration. *Id.*, ¶ 4. The appellant then filed a Board appeal concerning his removal, more than a year after the 30-day deadline had passed. *See* 5 C.F.R. § 1201.154(b). We applied section 7702(f) to find that the appellant's submission to the EEOC, which was made within 30 days of the final agency decision on his mixed-case complaint and which should have been made to the Board, must be

deemed a timely appeal to the Board. *Williams*, 115 M.S.P.R. 318, ¶ 10. Similarly, in this case, the appellant's attempt to amend his discrimination complaint to encompass his removal was made within the 30-day period for filing a Board appeal but was submitted to the wrong agency (an EEOC AJ). We find no meaningful distinction between this case and *Williams*, and we therefore deem the appellant to have timely appealed his removal under 5 U.S.C. § 7702(f).

ORDER

For the reasons discussed above, the initial decision is VACATED. The appeal is REMANDED to the regional office for further adjudication.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.