

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

JOHN J. GAYNOR,  
Appellant,

v.

U.S. POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
SL07528810200

DATE: FEB 15 1990

Bruce Clark, American Postal Workers Union, Dubuque,  
Iowa, for the appellant.

Janice L. Barrier, Cedar Rapids, Iowa, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board pursuant to the appellant's petition for review of the initial decision issued on June , 1988, dismissing his appeal as untimely filed. After full consideration, the Board DENIES the appellant's petition because it does not meet the Board's criteria for review. See 5 C.F.R. § 1201.115. However, for the reasons set forth below, the Board REOPENS the case on its own motion under 5 U.S.C. § 7701(e)(1)(B) and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

**BACKGROUND**

On December 23, 1983, the appellant received a letter from the Postmaster of his facility advising him that, based on medical documentation he had submitted, as well as the results of an examination ordered by the agency, it had been determined that the appellant could no longer fully and regularly perform the duties of his City Carrier position. See Agency File, Tab 4b. He was further advised, therefore, that his duties as a carrier would be terminated, effective December 30, 1983. The other options available to the appellant, according to the letter, were to request a transfer to the Clerk craft or to retire, "an obvious alternate option which we are not pushing." *Id.* On December 30, 1983, the appellant requested a transfer to the Clerk craft. See Appeal File, Tab 1. The reassignment was effective on January 7, 1984. See Agency File, Tab 4a. On January 3, 1985, the appellant retired. *Id.*

On April 22, 1988, the appellant filed an appeal with the Board's St. Louis Regional Office. He alleged that his acceptance of the reassignment and his retirement were involuntary actions. He noted that, in its December 23, 1983, letter, the agency had failed to set forth his appeal rights to the Board. In addition, he alleged that the agency's actions were the result of discrimination on the basis of his age (65).

In response to the administrative judge's letter ordering the appellant to show cause why his appeal should not be dismissed for lack of jurisdiction and untimeliness, the appellant repeated that his actions were involuntary and argued that, while he had attempted to pursue the matter through the grievance route during this extended period, he was unaware of the Board's existence and only inadvertently learned of it in April 1988, at which time he appealed promptly. *Id.* at Tabs 3 and 5.

In his initial decision, the administrative judge dismissed the appeal as untimely filed, finding that the appellant had not been diligent in seeking out his appeal rights and that he had not taken reasonably prudent steps to challenge what he now contends was a coerced retirement.\*

#### ANALYSIS OF ALLEGATIONS ON PETITION FOR REVIEW

In his petition for review, the appellant disputes the administrative judge's finding that he did not exercise due diligence in pursuing his appeal rights with the Board. In this regard, he has submitted various correspondence, as well as copies of his phone bills, through which he purports to show that he attempted unsuccessfully, during the several

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In view of his finding that the appellant's appeal was not timely filed, the administrative judge determined that it was unnecessary to address the issue of the voluntariness of the appellant's retirement. See Initial Decision at 6 n.4. Similarly, the Board finds no need to address this matter or the question of whether appellant was entitled to appeal any adverse action to the Board at the time of his resignation. See *Wafford v. U.S. Postal Service*, 34 M.S.P.R. 691 (1987).

years following his reassignment and retirement, to learn of his appeal rights. Certain of these documents coincide approximately with the date of the appellant's retirement. Others were obviously procured after the initial decision was issued. Because the appellant has provided no explanation for his failure to submit this evidence prior to the close of the record, the Board will not now consider it. See *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

#### BASIS FOR REOPENING

We reopen this case first, to determine if the outcome of the case is affected by recent precedent of the U.S. Court of Appeals for the Federal Circuit and, secondly, to correct certain errors in the initial decision.

Application of *Shiflett v. United States Postal Service*, 839 F.2d 669 (Fed. Cir. 1988)

In *Shiflett*, an employee's request for restoration following compensable injury was denied by the agency, and she was not advised that she could appeal the denial to the Board. She appealed eleven months after the denial, seeking a waiver of the time limit for filing. Reversing the administrative judge's granting of the waiver, the full

Board found that the appellant had not exercised due diligence in pursuing her appeal rights. The court reversed, stating that the critical and controlling fact was not the alleged lack of diligence on the part of the employee, but the flagrant violation of the regulations by the agency in failing to give her notice of her appeal rights as prescribed by the regulations. *Id.* at 673. Further finding that the agency had thereby contributed to, or perhaps even caused, the untimely filing, *id.*, the court found that the employee had, in fact, shown good cause for her late filing. *Id.* at 674.

At issue in this case is whether the agency's letter of December 23, 1983, could be construed as a letter of decision with respect to any action as to which the appellant had a right of appeal. If so, then pursuant to *Shiflett*, there could be a basis for waiving the regulatory time limit for filing an appeal.

Our review of that letter, however, reflects that it was a statement of options and that it was not, contrary to the appellant's assertions, a final decision of any sort. Although the letter advised the appellant that, based on his physical inability to perform, his services as a carrier would be terminated on a certain date, it did not state that, as a result, he would be removed from the agency's rolls. Further, the letter offered the appellant the option of requesting a transfer to the Clerk craft, an option he exercised. Even if the appellant believes that he was

coerced into accepting the Clerk position, such an action would not give rise to an appeal since the Board has no jurisdiction to review an employee's reassignment without loss of pay or grade. . See *Hennessey v. United States Postal Service*, 28 M.S.P.R. 127, 128 (1985).

With regard to the appellant's decision to retire, made over a year after he received the agency's letter, we note that the *Shiflett* case is arguably inapplicable, since the action in that case, denial of restoration, provided for appeal rights to the Board as prescribed by Office of Personnel Management regulations. A retirement, on the other hand, is presumed to be a voluntary action, see 5 C.F.R. § 715.201, and is, thus, not within the Board's appellate jurisdiction. See 5 U.S.C. § 7512 and 5 C.F.R. § 1201.3. Although the appellant now contends that his retirement was involuntary, and therefore, tantamount to an adverse action, he has failed even to assert, much less establish, that the agency knew that he perceived the action as one obtained through duress or coercion, and that, therefore, it had an obligation to inform him of his rights. See *Schrum v. Department of the Treasury*, 42 M.S.P.R. 103 (1989); *Malone v. Air Force*, 41 M.S.P.R. 594 (1989).

In sum, we agree with the administrative judge that the appellant's appeal was untimely filed and that he has not shown good cause for waiver of the regulatory time limit for filing. We further conclude that the *Shiflett* case provides no support for a contrary finding.

Administrative Judge Error

In his initial decision, the administrative judge erred in failing to dispose of the appellant's allegation that the agency's actions in this case were discriminatory based on his age. We do not find, however, that the error was harmful. See *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights). In fact, because the case was properly dismissed on the grounds of timeliness, the Board has no jurisdiction to review the appellant's allegation of discrimination. See *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd sub nom. Wren v. Merit Systems Protection Board*, 681 F.2d 867, 871-73 (D.C. Cir. 1982) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction).

Finally, we note that the administrative judge erroneously cited the date of the appellant's retirement as December 30, 1983. See Initial Decision at 1. It was on that date that the appellant agreed to accept a transfer to the Clerk craft. His retirement, as previously noted, did not occur until January 3, 1985. *Karapinka*, 2 M.S.P.R. at 127.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

**NOTICE TO APPELLANT**

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board