

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

WILFRED M. HAMILTON,  
appellant,

v.

TENNESSEE VALLEY AUTHORITY,  
agency.

DOCKET NUMBER  
SL07528510190

DATE: February 4, 1986

BEFORE

Herbert E. Ellingwood, Chairman  
Maria L. Johnson, Vice Chair  
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant petitioned the Board's St. Louis Regional Office for appeal of what he believed to be his involuntary resignation from his position of Ironworker. He alleged that, as a non-union member, he was subjected to serious harrassment by his union-member co-workers which coerced him into leaving the worksite on January 17, 1984, never to return, and that the agency's inaction, in the face of its knowledge of that harrassment, rendered his resignation involuntary.

The Board's designated presiding official analyzed the testimonial evidence elicited at the oral hearing on appeal, and concluded that the appellant had failed to prove that the alleged coercion was sufficiently serious to render his resignation inherently involuntary. He found further that the appellant did not demonstrate that the agency was sufficiently on notice of the union mistreatment to render its inaction a constructive discharge appealable to the Board. He therefore dismissed the appeal for lack of appellate jurisdiction, finding it "unnecessary to determine the timeliness of the petition for appeal."

The appellant has now petitioned for review of that initial decision. The agency has responded, opining that the presiding official's conclusions regarding the voluntariness of the appellant's resignation were correct, but urging that the dismissal of the appeal be affirmed on the alternative grounds that the petition for appeal had been untimely filed.<sup>1/</sup> Because we agree with the agency's contention, we hereby DENY the petition for review, REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, and VACATE the initial decision of August 23, 1985.

The facts on the question of timeliness are not in dispute. The appellant did not report to work after January 17, 1984. On January 26, 1984, the agency sent him a letter, received on January 28, asking him to apprise it of his status and requiring him to respond within 10 days from the date of the letter. The appellant did not file a timely response to that letter. Therefore, the agency assumed that the appellant had resigned, and it terminated him on that basis on February 10, 1984, effective January 17, 1984. The petition for appeal in this case was not received by the Board until May 2, 1985, more than a year after his termination.

A review of the record also reveals that the appellant was first made aware of his right to appeal the alleged adverse action against him in February of 1984. He testified that on February 1, 1984, a co-worker came to his house to inform him that he could appeal his termination to the Merit Systems Protection Board, and that he should consult a particular attorney, who then became his representative on February 13, 1984. Hearing Transcript pages ("Tr.") 30, 36 and 43.

Additionally, in August of 1984, the appellant participated as a witness at the oral hearing in the Board appeal of another agency employee, who pursued claims similar

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<sup>1/</sup> The agency had raised this contention in its response to the Initial Order of the St. Louis Regional Office in this appeal, as well as in its opening and closing arguments at the oral hearing. Hearing Transcript ("Tr.") at 54 and 134.

to those raised by the appellant here.

We note further that, rather than appeal to the Board, the appellant filed a lawsuit against the agency and the union in the U.S. District Court for the Western District of Kentucky on July 12, 1984, alleging many of the same claims raised in this appeal. See Attachment to Agency Response (May 24, 1985) to Initial Order of the St. Louis Regional Office. Among the reasons set forth in the agency's motion to have itself dismissed as a party to that lawsuit was the appellant's failure to invoke and exhaust his right to administrative review of the personnel action in question before the Board. Therefore, although the appellant and his attorney had reason to know of his Board appeal rights in February and August of 1984, they were made expressly aware of those rights at least as of the date of the agency's motion to dismiss in District Court on September 14, 1984.<sup>2/</sup>

Therefore, the appellant's petition for appeal, received by the Board on May 2, 1985, was filed 15 months after the effective date of his separation, 14 months after he and his attorney received indirect notification of his Board appeal rights, 9 months after he testified in a similar Board appeal by a co-worker, 8 months after he and his attorney received direct notice of his Board appeal rights in the context of his civil suit, and 48 days after the District Court dismissed his civil action for having previously failed to invoke and exhaust those rights.

In his petition for review, the appellant argues only that he believes it unfair for the agency to have failed to

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<sup>2/</sup> On March 15, 1985, the District Court did dismiss the appellant's civil lawsuit "without prejudice to plaintiff's right to file an appeal from his termination to the Merit Systems Protection Board (MSPB) or to file further judicial actions after MSPB has issued its judicially reviewable decision." This statement by the District Court does not of itself establish good cause for waiving the regulatory filing deadline under the standards set forth for such a determination in Alonzo v. Department of the Air Force, 4 MSPB 262 (1980).

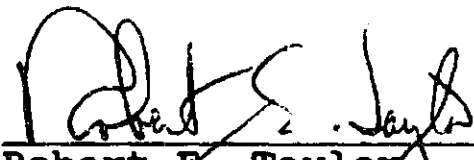
give him the pre-termination procedural protections of 5 U.S.C. § 7513, yet to hold him to strict compliance with its letter of January 26, 1984, giving him 10 days in which to apprise it of his employment status before assuming him to have resigned. However, he fails to address the issue of the untimeliness of his petition for appeal to the Board, either in his petition for review or below.

By any standard, then, the appellant's petition for appeal to the Board was untimely, and he has failed to show good cause for waiver of the regulatory filing deadline under 5 C.F.R. §§ 1201.12 and 1201.22(b). See Alonzo v. Department of the Air Force, 4 MSPB 262 (1980).

Accordingly, the appellant's petition for appeal is hereby DISMISSED as untimely filed. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.115(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.