

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

KAREN M. LESLIE

Appellant,

v.

UNITED STATES POSTAL SERVICE

Agency.

DOCKET NUMBER

AT-0752-98-1073-I-1

DATE: September 10, 1999

Roy Lee Palmer, Decatur, Georgia, for the appellant.

Cynthia Johnson, Atlanta, Georgia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the December 22, 1998 initial decision that dismissed her appeal as untimely. For the reasons discussed below, we find that the petition does not meet the requirements for review at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal to the Atlanta Regional Office for further adjudication.

BACKGROUND

¶2 On August 26, 1998, the appellant sent two petitions for appeal by facsimile to the Board's Atlanta Regional Office. The first one stated that she was appealing the agency's decision to remove her, effective June 10 or 30 (the date is unclear) through a notice which she stated she received on July 25, 1998. In the second petition for appeal, the appellant stated that she was appealing from a July 11, 1997

removal, which was effected through a notice she received on July 18, 1997. With her petitions, she attached a June 30, 1998 decision from the agency removing her from her position in Duluth, Georgia, effective July 10, 1998. Appeal File, Tab 1.

¶3 In his acknowledgment order, the administrative judge noted that the "appeal" appeared to be untimely. He ordered the appellant to file evidence and argument regarding timeliness. Appeal File, Tab 2. In its response, the agency moved to dismiss the appeal as untimely. It argued that the appeal was 16 days late, with no showing of good cause for the delay. The agency argued that the appellant moved to Denver, Colorado, and failed to provide her new address to the agency, as required, thus demonstrating negligence in complying with the time limits. Appeal File, Tab 3.

¶4 The appellant responded to the acknowledgment order through her representative. She argued that she was a disabled veteran who had completed one year of continuous service. With regard to timeliness, she argued that she had moved to Denver, and that she did notify the agency of her move, as evidenced by the fact that the agency forwarded mail to her new address in Denver. She also stated that she "never received" the notice of proposed removal and the notice of decision. Appeal File, Tab 4 at 2. She continued to argue that she had been removed in July 1997, but stated that she was informed on September 25, 1998 that she had been removed effective July 1998, and now wishes to appeal from the 1998 removal as well as the 1997 one. Further, she argued that she suffered from depression, for which she was being treated, and for which she had filed a workers' compensation claim. She also stated that she had personal problems relating to her moving, and was confused about what was going on with the current removal action. Appeal File, Tab 4.

¶5 The administrative judge then issued his initial decision dismissing the appeal. He found that the effective date of the action being appealed was June 10, 1998, and that the appellant's August 26, 1998 appeal was 47 days late. He further found that she had not properly notified the agency of her change of address, in that a request to forward mail was not the equivalent of proper notice under the Employee and Labor Relations Manual (ELM). He concluded that the agency met its obligation by sending her a notice to her last address of record, and that, to the extent that led to a delay in her filing, her delay was not excused, because she had been responsible for providing the agency with a current address. Appeal File, Tab 5.

ANALYSIS

¶6 With regard to the appellant's statement that she was removed in 1997, we note that the only removal action documented in the record is from July 1998. Nevertheless, she did file an appeal in July 1997 from a termination effective July 10, 1997. This appeal was dismissed for lack of jurisdiction because she had not

completed a year of current continuous service in the same or similar position. *See Leslie v. U.S. Postal Service*, MSPB Docket No. AT-315H-97-0853-I-1 (Initial Decision) (Aug. 22, 1997).

¶7 The appellant states that she was told that she would be terminated in 1997, but that she was "reinstated." Appeal File, Tab 1 at 13. As evidenced by the June 30, 1998 notice, she was then terminated on July 10, 1998. Her statement that the agency removed her effective June 10 or June 30, 1998, is inaccurate.

¶8 A petition for appeal must be filed within 30 days after the effective date of the action being appealed. *See* 5 C.F.R. § 1201.22(b); *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 436 (1998). Here, the appellant filed her petition of the July 10, 1998 removal 16 days late, and not 47 days as found by the administrative judge. In order to establish good cause for this delay, she must show that she acted with due diligence under the circumstances of the case, or that the delay was due to circumstances beyond her control. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

¶9 In response to the administrative judge's acknowledgment order, the appellant offered several reasons for her late filing. Among these was her comment that she suffered from depression, for which she had been treated, and for which she had filed a workers' compensation claim. Because she raised a claim of mental illness as the reason for her delayed filing, the appellant should have been provided with explicit information for establishing good cause for waiver on that basis. *See Klages v. Department of Defense*, 80 M.S.P.R. 594, 596 (1999); *Lacy*, 78 M.S.P.R. at 437. She should have been informed that to establish that her untimely filing was the result of her illness, she has to: 1) identify the time period during which she suffered from the illness; 2) submit medical and/or corroborating evidence showing that she suffered from the alleged illness during that time period; and 3) explain how the illness prevented her from timely filing her appeal or a request for an extension of time. *See id.*

¶10 The administrative judge did not provide the appellant with the necessary explicit notice of what she needed to prove to establish her medical excuse for her late filing. Accordingly, the initial decision must be vacated, and the appeal remanded, in order to provide the appellant with a full and fair opportunity to submit evidence and argument to show that she met the standard set forth above. *See Smith v. Merit Systems Protection Board*, 168 F.3d 1305, 1307 (Fed. Cir. 1999); *Klages*, 80 M.S.P.R. at 597.

¶11 We note that the focus below was on whether the appellant had properly notified the agency of her change of address, in that the appellant claimed in part that her late filing was due to her late receipt of the proposal to remove her and of the removal notice. As the administrative judge found, service on an appellant at the last address of record is proper. *See Schorr v. Department of the Navy*, 79 M.S.P.R. 594, 598 (1998). It is the appellant's obligation to keep the agency apprised of her change of address. *See id.* Nevertheless, if the appellant meets the

Lacy requirements, and can show that her mental illness adversely affected her ability to comply with this requirement, then her failure to do so, and her late filing that was the result of her failure, would be excused. Accordingly, on remand the appellant should either establish that she did properly notify the agency of her change of address, or address the effects of her alleged illness on her ability to so properly notify the agency.

¶12 Finally, given the apparent confusion regarding which action is being appealed, the administrative judge should confirm that the appellant is currently appealing from the removal that was effective July 10, 1998.

ORDER

¶13 This appeal is hereby remanded to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.