

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

75 M.S.P.R. 144

Docket Number AT-0752-94-0127-M-1

WILLIE L. WILLIAMS, JR., Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Agency.

Date: MAY 23, 1997

David A. Sullivan, Esquire, Birmingham, Alabama, for the appellant.

Theodore E. Ravas, Jr., Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

This appeal is before the Board pursuant to a remand from the Court of Appeals for the Federal Circuit. For the reasons set forth below, we REOPEN the appeal, VACATE the final Board decision that dismissed the appeal as untimely filed, and REMAND the appeal to the regional office for adjudication on the merits.

BACKGROUND

The agency decided to remove the appellant from his GM-14 Supervisory Trial Attorney position. The appellant retired on the date that his removal otherwise would have been effected, and filed a timely formal complaint of discrimination with the agency. The agency issued a final decision dated October 7, 1993 finding no discrimination, which it mailed to the appellant by certified mail, return receipt requested. See Initial Appeal File (IAF), Tab 9, Subtab 3C. The appellant filed this appeal on or about November 10, 1993. IAF, Tab 1.

The administrative judge dismissed the appeal for lack of jurisdiction, without making a finding on the timeliness of the appeal. The Board reversed that decision on review, holding that the appellant can appeal the agency's decision to remove him notwithstanding his retirement. The Board remanded the appeal to the regional office with instructions that it be adjudicated on the merits, if the administrative judge determined that the appeal had been timely filed or, if untimely, that there was good

cause for the delay. *Williams v. Equal Employment Opportunity Commission*, 64 M.S.P.R. 436, 441 (1994).

On remand, the agency argued that the appeal had been filed "late." See Board Remand File, Tab 6. The administrative judge dismissed the appeal as untimely filed with no good cause. *Id.*, Tab 8. The remand initial decision became final when we denied the appellant's petition for review for failure to meet the criteria for review. *Williams v. Equal Employment Opportunity Commission*, 70 M.S.P.R. 462 (1996) (Table).

The appellant filed a timely petition for review of the final Board decision in the Court of Appeals for the Federal Circuit. See Litigation File, Tab 1. The Board filed a motion requesting that the court remand the appeal for the purpose of "direct[ing] the employing agency to produce any relevant evidence in its possession regarding the timeliness of the appellant's appeal and ... reconsider[ation of] this issue under *Hamilton v. Merit Systems Protection Board*, 75 F.3d 639 ([Fed. Cir.] 1996)." *Id.*, Tabs 13, 16. The court granted the motion and remanded the appeal. *Id.*, Tab 19. In response to an order from the Clerk of the Board, the agency has submitted a postal return receipt showing that the appellant received the final agency decision on his discrimination complaint less than 20 days before he filed this appeal. See Court Remand File, Tab 7 at 2.

ANALYSIS

The deadline for filing this appeal was 20 days from the date the appellant received the final agency decision on his discrimination complaint. See 5 C.F.R. § 1201.154(b)(1) (1993).¹ The administrative judge found that the appellant filed this appeal on November 10, 1993. She further found that the agency mailed its final decision on October 8, 1993, and that, absent evidence indicating otherwise, she would presume that the appellant received the decision within 5 business days, *i.e.*, by October 15, 1993. She thus concluded that the appeal was due no later than November 4, 1993, and that it had been filed 6 days late. In so concluding, the administrative judge rejected the appellant's argument that the agency was obligated to produce the postal return receipt showing the date that he received the final agency decision. See Board Remand File, Tab 4.

After the administrative judge issued her decision, the court issued its decision in *Hamilton v. Merit Systems Protection Board*, 75 F.3d 639 (Fed. Cir. 1996). In *Hamilton*, the appellant filed a petition for appeal 53 days after the date of issuance of the final agency decision on her formal complaint of discrimination. The administrative judge dismissed the appeal as untimely filed, based on the presumption that the appellant received the final agency decision 5 days after it was issued. See 75 F.3d at 641-42. The appellant submitted evidence with her petition for review showing that she did not

¹ After this appeal was filed, the regulatory filing period was lengthened to 30 days from the date an individual receives the final agency decision on his or her discrimination complaint. See 59 Fed. Reg. 31,109 (1994).

receive the final agency decision until one month after it was issued, thus establishing that her appeal had been timely filed, but the full Board denied her petition. See *Hamilton v. Department of Transportation*, 60 M.S.P.R. 592 (1994) (Table).

The court reversed the final Board decision, concluding that the appellant was denied a "full and fair opportunity to litigate the [timeliness] issue." 75 F.3d at 645. The court held that the administrative judge should have advised the appellant, prior to dismissal, of the date that he would presume she received the final agency decision in the absence of countervailing evidence. *Id.* at 646-47. The court also noted that the agency did not submit any evidence regarding the date that the appellant received the final agency decision, and stated that the administrative judge should have ordered both parties to submit whatever evidence they possessed concerning the date of receipt. See *id.* ("we reject the [agency's] argument that it had no obligation to come forward with relevant evidence [on timeliness] in its possession"). The court found it appropriate under the circumstances to consider the appellant's evidence of the date she received the final agency decision, even though she had not submitted it to the administrative judge, and concluded that the appeal had been timely filed. *Id.* at 647.

In *Marjie v. U.S. Postal Service*, 70 M.S.P.R. 95 (1996), we accepted evidence, filed for the first time on review, that the appellant timely filed his appeal after receiving the agency's final decision on his discrimination complaint. We did so because the appellant had not been told, prior to dismissal, of the date that the administrative judge would presume he received the final agency decision in the absence of direct evidence on the issue, and also because the agency had not been ordered to submit whatever evidence it possessed on the timeliness issue.

Unlike *Hamilton* and *Marjie*, the appellant in the present case did not submit evidence for the first time on review showing the date that he received the final agency decision on his discrimination complaint. We denied the petition for review because the record did not show that the appeal had been timely filed, nor did it otherwise demonstrate that the administrative judge abused her discretion in dismissing the appeal under the law in effect when she issued the initial decision.

Upon reflection, however, we have concluded that *Hamilton* represents good policy, and that it should govern this case. In *Hamilton* the court made two major statements: Before dismissing an appeal, an administrative judge should inform an appellant of the date that a document triggering the running of the appeal period will be presumed to have been received, in the absence of direct evidence; and both parties should be ordered to produce whatever evidence they possess on timeliness. Without deciding whether either of these statements may have been *dictum* (again, the court was presented with evidence showing that the appeal had been timely filed), we agree with and adopt both statements as standard procedure for all cases.

In the present case, in accordance with *Hamilton*, the agency was ordered to produce the postal return receipt showing the date that the appellant received the final agency decision on his discrimination complaint. The postal return receipt shows that the appellant received the final agency decision on October 25, 1993. See Court Remand File, Tab 7 at 2. The agency argues that the date shown on the postal return receipt is "not dispositive," and that the appellant should be required to show that he

did not receive the final agency decision before October 25. According to the agency, the Postal Service sometimes leaves certified mail with the addressee, and allows the addressee to fill in any date as the date of receipt. *Id.*, Tab 3. We reject this argument. There is no evidence that the dates shown on return receipts are unreliable in general, nor is there any reason to believe that, in this particular case, the appellant actually received the final agency decision prior to the date shown on the postal return receipt. The very purpose of sending an article using return receipt service is to establish a record of receipt, including the date; the agency chose this method to send the final agency decision to the appellant, and it cannot now disavow the record created.

The 20th business day after October 25, 1993 was November 15, 1993. The postmark on the envelope containing the petition for appeal is difficult to read, but the petition in any event was received by the regional office on November 12, 1993. IAF, Tab 1. Thus, the appeal was timely filed. The final Board decision dismissing the appeal as untimely filed is VACATED.

As noted above, the agency filed a motion to dismiss before the administrative judge in which it argued that the appeal had been filed "late" even though the agency possessed evidence showing that the appeal had been timely filed.² See Board Remand File, Tab 6 (motion at 3). The failure to disclose the evidence it had regarding timeliness and filing its own motion to dismiss asserting lack of timeliness appear to be the sort of "gamesmanship" that the court denounced in *Hamilton*. 75 F.3d at 646. Indeed, the fact that a government agency would seek dismissal of an appeal on timeliness grounds when it possessed evidence showing that the appeal was timely filed persuades us of the wisdom of always ordering both parties to file whatever evidence they have concerning timeliness.

Finally, the agency argues -- without any citation to authority -- that we lack jurisdiction over this appeal because the appellant has filed a complaint in federal district court under Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e-16, contesting his removal. See Court Remand File, Tab 3. We disagree. In *Connor v. U.S. Postal Service*, 15 F.3d 1063 (Fed. Cir. 1994), the court held that the Board lacked jurisdiction over an appeal from a removal because the appellant filed a complaint in district court under Title VII contesting the removal, before he filed the Board appeal. Here, by contrast, the appellant filed his complaint in district court long after he initiated this appeal. *Cf. McGovern v. Equal Employment Opportunity Commission*, 28 M.S.P.R. 689, 691 n.1 (1985) ("nothing in law or regulation" divested the Board of jurisdiction over an appeal based on the appellant's subsequent filing of a Title VII action in district court).

The district court stayed its proceedings when it learned that the appellant was continuing to pursue a remedy in another forum, see Court Remand File, Tab 6 at 4, so the agency is not being forced to litigate the same subject matter here and in district court simultaneously. In fact, the agency has moved to dismiss the district court action on the ground that the appellant did not timely initiate his Board appeal. *Id.* at 4-5.

² The motion was filed by a different agency representative than the one listed on the first page of this decision.

Assuming that under some circumstances it would be appropriate to dismiss an appeal because of a later-filed Title VII action in district court, such circumstances are not present here.

ORDER

The December 20, 1995 remand initial decision, which became the final decision of the Board on April 17, 1996, is VACATED. The appeal is REMANDED to the Atlanta Regional Office for adjudication on the merits.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.