UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

69 M.S.P.R. 78

Docket Number AT-0752-94-0494-I-1

JEANOBIA TOOMBS, Appellant,

v.

DEPARTMENT OF THE ARMY, Agency.

Date: December 12, 1995

Ron S. Iddins, Esquire, Columbus, Georgia, for the appellant.

Anne Norfolk, Esquire, Fort Benning, Georgia, for the agency.

BEFORE

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

Member Amador issues a dissenting opinion.

OPINION AND ORDER

The appellant has filed a petition for review of a May 19, 1994 initial decision that dismissed her appeal as untimely filed. For the reasons discussed below, the Board GRANTS the petition under 5 U.S.C. § 7701(e), REVERSES the initial decision, and REMANDS the case to the Atlanta Regional Office for adjudication on the merits.

BACKGROUND

The agency removed the appellant from the position of Occupational Therapy Assistant, GS-05, effective May 28, 1993. Initial Appeal File (IAF), Tab 5 (4b). She filed a formal complaint of discrimination with the agency concerning her removal. After the agency issued its final decision in her complaint, she attempted to file an appeal with the Board's regional office on March 23, 1994. IAF, Tabs 1 and 2. Specifically, her attorney filed a letter which stated that the appellant was filing a formal appeal of the Army's final

decision in her equal employment opportunity complaint dated July 26, 1993. IAF, Tab 1.

In a notice dated March 25, 1994, the regional office returned the appeal to the appellant as deficient under the Board's policy of rejecting only the most deficient appeals. IAF, Tab 1. Specifically, the notice informed the appellant that (1) she had not provided an original and one copy of her appeal and all attachments, and that (2) she had not clearly indicated what agency action she was attempting to appeal and its effective date. The notice further informed the appellant that she had fifteen days from the date of the notice to refile her appeal. The appellant refiled her appeal on April 12, 1994, one day late. In response to a timeliness show-cause order, the appellant stated that she refiled the appeal within fifteen days of her actual receipt of the deficiency notice. *See* Initial Decision (ID) at 2-5; IAF, Tab 4. The appellant also asserted that the deficient petition for appeal was timely filed with the Board, even though the agency failed to provide her with the Board's appeal form and regulations.

The administrative judge found that the appellant had not presented any evidence to establish that circumstances beyond her control existed which affected her ability to comply with the time limit to refile her appeal set forth in the March 25 notice or that she exercised due diligence or ordinary prudence. Further, the administrative judge found that the March 25 notice was clear on its face and that it advised the appellant of the refiling deadline. Thus, the administrative judge concluded that the appellant did not show good cause for the filing delay and dismissed the appeal as untimely filed. The appellant's petition for review reasserts the arguments she raised below.

ANALYSIS

The Board's regulations in effect at the time the appellant filed the appeal provided in pertinent part that, an appeal must be filed within twenty days after the effective date of the action being appealed.[1] If the appellant has filed a timely formal complaint of discrimination with the agency, an appeal must be filed within twenty days after the appellant receives the agency resolution or final decision on the discrimination issue.[2] Here, the administrative judge found that the appellant's initial filing with the Board was timely. *See* Initial Decision at 2 n.1. We adopt this finding and note that the agency did not file a cross-petition for review on this issue.

However, the appellant's timely-filed petition for appeal was deficient. Thus, she was required to perfect her petition by refiling it with the deficiencies corrected within fifteen days from the notice dated March 25,

1994. She did not refile her appeal until April 12, 1994, one day late. IAF, Tab 2.

Nevertheless, we remand the petition for appeal for adjudication on the merits. To dismiss the petition -- which was timely filed -- because the appellant failed by one day to timely respond to the administrative judge's order to refile a corrected petition for appeal, would amount to imposing the most severe sanction available: Dismissing the appeal for failure to prosecute. The Board will impose a sanction on a party only "as necessary to serve the ends of justice." 5 C.F.R. § 1201.43; *See Wright v. Department of the Treasury*, 53 M.S.P.R. 244, 249 (1992). The sanction of dismissal of an appeal for failure to prosecute should not be imposed for a single instance of failure to comply with a Board order. *Carrier v. U.S. Postal Service*, 65 M.S.P.R. 54, 57 (1994); *Diaz v. Department of Health & Human Services*, 57 M.S.P.R. 325, 328 (1993). In the absence of bad faith or evidence that the appellant intends to abandon her appeal, dismissal for failure to prosecute is generally inappropriate. *See Slaughte*r *v. U.S. Postal Service*, 60 M.S.P.R. 10 (1993). Furthermore, even though such a sanction should be avoided especially where an appellant is pro se, the fact that a party is represented by an attorney does not require a different result. *See Morris v. Office of Personnel Management*, 37 M.S.P.R. 401 (1988)(the Board reinstated an appeal where the appellant's attorney failed to respond to two separate orders of the administrative judge, but presented sufficient evidence on petition for review to show that he did not abandon the appeal and made good faith efforts to comply with the administrative judge's orders).

Here, the appellant who is represented by an attorney, has not acted in bad faith, and there is nothing that would lead us to believe that she intended to abandon her appeal. Indeed, all indications are to the contrary. She acted well within the time limits when she originally filed her petition for appeal, even though the agency did not provide her with the Board's appeal form and regulations. IAF, Tab 5(3). Further, she promptly responded to the administrative judge's timeliness show-cause order, and explained that she had refiled the appeal within fifteen days of her actual receipt of the deficiency notice. IAF, Tab 4. Thus, we conclude that, under the circumstances, denying the appellant an opportunity for a review of her case on the merits would not serve the ends of justice.

Accordingly, we remand this case to the Atlanta Regional Office for adjudication on the merits.

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

DISSENTING OPINION OF MEMBER AMADOR

Jeanobia Toombs v. Department of the Army

MSPB Docket No. AT-0752-94-0494-I-1

The Board's regulations set forth the time limits for filing appeals. 5 C.F.R. § 1201.22(b). If an appeal is not filed within the regulatory time limit, "it will be dismissed as untimely filed unless a good reason for the delay is shown." 5 C.F.R. § 1201.22(c); *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180 (1980).

The Board's reviewing court, the Court of Appeals for the Federal Circuit, recognizing that Congress has granted the Board wide discretion in handling appeals and controlling its docket, limits its review of cases where timeliness is at issue to determining whether the grant or denial of a waiver was arbitrary, an abuse of discretion, or otherwise not in accordance with the law. *See, e.g., Rowe v. Merit Systems Protection Board*, 802 F.2d 434, 437 (Fed. Cir. 1986). Where timeliness is at issue, the court has uttered no general pronouncement that any one factor, such as a minimal delay, mandates that the Board waive its filing deadline. To the contrary, the Federal Circuit has consistently affirmed the Board's denial of a waiver in cases where the delay is minimal and a good reason for the delay is not shown.[3]

In *Mendoza v. Merit Systems Protection Board*, 966 F.2d 650 (Fed. Cir. 1992), the court considered, in banc,[4] the issue of whether the appellant demonstrated excusable delay. The court explained that:

> [l]itigants before the Board ... are obligated to respect the Board, its procedures, including deadlines, and the orders of the Board's judges. The doors of the tribunal are open to all claimants but only on the same terms. This is the essence of due process and equal treatment under the law.

Mendoza, 966 F.2d at 653. The court found that the administrative judge had properly dismissed the appellant's appeal as untimely filed because her claim that she was "very old and sickly" was unsupported, and she did not respond to the administrative judge's order requesting evidence showing good cause for the delay. Thus, the appellant did not carry her burden of demonstrating excusable delay -- of proving facts which would show that she exercised diligence and ordinary prudence in filing her appeal. *Id*.

In the case before us, the appellant's appeal did not satisfy certain filing requirements; in his March 25, 1994 deficiency notice, the regional director informed the appellant that: "You must refile your appeal, with all deficiencies corrected, within 15 days of the date of this notice .... If you

refile it by mail, the date of refiling is the postmark date." Initial Appeal File (IAF), Tab 1. Thus, to be timely, the appellant had to refile her appeal no later than Monday, April 11, 1994, since the fifteenth day fell on a weekend. 5 C.F.R. § 1201.23.

The appellant refiled her appeal on April 12, 1994. In his cover letter, the appellant's representative stated that, "This appeal is being filed within 15 days of the receipt of your letter dated March 25, 1994." IAF, Tab 2. In response to the administrative judge's order to show cause for the untimely filing, the appellant's representative replied:

> The Appellant did refile ... within 15 days of receipt of the notice from the MSPB. According to the terms of the letter, the Appellant had until April 9, 1994, to refile. That date fell on a Saturday. The first business day thereafter was April 11, 1994. Therefore, by using the strictest interpretation, the appeal was, at the most, one day untimely.

IAF, Tab 4. The appellant further contended that the agency did not give her "reasonable notification of the appeal requirements," and she complained that the appeal "was returned without explanation for the authority for doing so." *Id*.

The regional director's refiling notice was both necessary and proper. Since it was not clear, from the appellant's initial filing, what action, or its effective date, the appellant was attempting to appeal, let alone whether it fell within the Board's jurisdiction, her filing did not meet the Board's filing requirements and could not have been docketed as an appeal. See 5 C.F.R. § 1201.24(a). In addressing the appellant's contention that the Board lacked authority to reject an otherwise timely filed but deficient appeal, the administrative judge noted that the question here is not whether there is good cause to excuse the defects of the initial filing, but rather, whether the appellant refiled within the time allotted after being given the opportunity to cure the defects.

While the administrative judge's decision, by itself, cannot be cited as authority, it is a remarkably clear and accurate analysis of the facts and the law in this case. The administrative judge correctly found that, in light of the straightforward directions notifying the appellant that the filing deadline ran from the date of the March 25 letter, the representative's affirmative statement that he was filing within 15 days of its receipt does not excuse the untimeliness. The failure to follow clearly stated instructions, even if a party is confused as to the Board's requirements, does not demonstrate diligence or ordinary prudence. *See, e.g., Allen v. United States Postal Service*, 44 M.S.P.R. 369, 372, *aff'd*, 918 F.2d 1897 (Fed. Cir. 1990)(Table), *cert. denied*, 499 U.S. 951 (1991). And, there is no indication that the appellant, or her representative, were confused. I note, as well, that where an appellant has received explicit notice of filing requirements, and her

representative has simply ignored an acknowledgment order, the court has found preposterous his claim that the alleged ambiguity, uncertainty, and complexities of the order justified his ignoring the explicit directive. *See, e.g., Chequina v. Merit Systems Protection Board*, No. 95-3326, slip op. at 5 (Fed. Cir. Nov. 7, 1995).

Under the circumstances before us, I would find that the appellant has not shown good cause for her delay. *See, e.g., Barr v. Office of Personnel Management,* 50 M.S.P.R. 66 (1991), *aff'd*, 975 F.2d 868 (Fed. Cir. 1992)(Table)(waiver of 1-day delay in refiling petition for review was not granted where evidence showed that appellant must have received notice from the Clerk at least 3 days prior to filing deadline). In accordance with the Board's regulations and precedent, I would find that the administrative judge properly dismissed the appeal as untimely.

I must take exception to the majority's assumption that dismissing an appeal as untimely filed (because no good reason has been shown for the delay) is the same as dismissing an appeal for failure to prosecute. Sanctions are generally recognized as a means by which the administrative judge has the authority to insure timely compliance with his orders during the appeals process; a good cause analysis however, is applied to determine if the merits of a late-filed appeal should be considered at all. *See, e.g., Cababaro v. Office of Personnel Management,* 57 M.S.P.R. 487, 488, *aff'd*, 11 F.3d 1073 (Fed. Cir. 1993)(Table). The question here is not whether sanctions would be appropriate under 5 C.F.R. § 1201.43, but whether the appellant showed that she complied with the Board's regulations at 5 C.F.R. §§ 1201.22-1201.24. As a general practice, the Board has determined that sanctions serve the end of justice, i.e., are appropriate, when a party's noncooperation has frustrated the Board's proceedings. *See, e.g., Hey v. United States Postal Service*, 57 M.S.P.R. 443, 448 (1993).

For the above reasons, I dissent.

[1]: Effective June 17, 1994, the Board amended its regulations to extend the filing period from 20 days to 30 days. 59 Fed. Reg. 31,109 (1994) (codified at 5 C.F.R. § 1201.22).

[2]: This filing period was also extended from 20 days to 30 days. 59 Fed. Reg. 31,109 (1994).

[3]: For example, in Rowe, supra, the court affirmed the Board's decision that the appellant's good faith reliance on his attorney's erroneous advice regarding the time limit did not show good cause for his 4-day filing delay. Rowe, 802 F.2d at 437. Further examples of cases where the court has affirmed the Board's denial of a waiver despite the minimal nature of the delay are: *Dade v. Office of Personnel Management*, 45 M.S.P.R. 12, *aff'd*, 923 F.2d (Fed. Cir. 1990)(Table)(1-day delay was not waived where the appellant provided no credible basis for finding that the petition was actually deposited in the mail 2 days earlier than the postmark indicated); *Mendoza v. Office of Personnel Management*, 43 M.S.P.R. 427, *aff'd*, 918 F.2d 187 (Fed. Cir. 1990)(Table)(9-day delay in filing petition for review mailed from Philippines not excused where appellant offered no explanation for delay); *Willis v. United States Postal Service,* 43 M.S.P.R. 439, *aff'd*, 907 F.2d 158 (Fed. Cir. 1990)(Table)(employee's failure to

follow straightforward directions in initial decision showed that he did not exercise due diligence or ordinary prudence when he filed petition for review 4 days late); *Dacus v. United States Postal Service*, 43 M.S.P.R. 416, *aff'd*, 907 F.2d 158 (Fed. Cir. 1990)(Table)(no waiver granted where appellant submitted no explanation for 4-day delay in filing petition for review); *Dotson v. United States Postal Service*, 41 M.S.P.R. 412 (1989), *aff'd*, 895 F.2d 1420 (Fed. Cir. 1990)(Table)(1-day filing delay not waived where contention that appeal was timely filed on October 11, 1988, was insufficient to overcome the stamped postmark showing date of October 12, 1988); *Henderson v. Department of Health and Human Services*, 40 M.S.P.R. 101, *aff'd* 887 F.2d 1095 (Fed. Cir. 1989)(Table)(10-day delay in filing request for review of arbitrator's decision not waived where there was no evidence that change of representatives prevented appellant from timely filing request); *Williamson v. Veterans Administration*, 40 M.S.P.R. 4 (1989), *aff'd*, 899 F.2d 1228 (Fed. Cir. 1990)(Table)(4-day filing delay not waived where appellant claimed late filing was due to theft of attache case and motion for waiver was unaccompanied by any supporting evidence); *Bryant v. Department of Justice*, 39 M.S.P.R. 632, *aff'd*, 889 F.2d 1099 (Fed. Cir. 1989)(Table)(response to petition for review not considered where it was submitted 3 days late where appellant claimed that he was refining the response); *Haaland v. Department of Energy*, 34 M.S.P.R. 175 (1987), *aff'd*, 846 F.2d 77 (Fed. Cir. 1988)(Table) (appellant's representative's inexperience causing 5-day delay not good cause for waiver); *Vitale v. Department of Justice*, 33 M.S.P.R. 97, *aff'd*, 833 F.2d 1023 (Fed. Cir. 1987)(Table) (1-day delay not waived where appellant did not submit evidence showing postmark was wrong or explain how having two jobs prevented him from timely filing); *Snipes v. Office of Personnel Management*, 32 M.S.P.R. 66, *aff'd*, 831 F.2d 306 (Fed. Cir. 1987)(Table)(3-day delay not waived where appellant's submissions did not show that she could not have obtained evidence prior to deadline for filing petition for review and appellant did not request an extension of time from the administrative judge or the Board); *Miller v. United States Marine Corps*, 21 M.S.P.R. 466 (1987), *aff'd*, 765 F.2d 160 (Fed. Cir. 1988)(Table)(2-day delay not waived where appellant asserted that the mailing time was out of her control and her representative was out of town for 2 days).

[4]: The Federal Circuit has stated that "a panel of this court is bound by prior precedential decisions unless and until overturned in banc." *Kimberly-Clark Corp. v. Fort Howard Paper Co.,* 772 F.2d 860, 863 (Fed. Cir. 1985). The Federal Circuit has not overturned Mendoza and like cases.