

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

2009 MSPB 87

Docket No. AT-0752-08-0843-I-1

**Diane N. Edwards,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

May 27, 2009

Robert F. McKee, Esquire, Tampa, Florida, for the appellant.

LeTonya F. Moore, Esquire, Bay Pines, Florida, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has timely petitioned for review of an initial decision that dismissed her appeal as withdrawn. For the following reasons, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from her GS-6 Police Officer position. Initial Appeal File (IAF), Tab 5, Subtabs 4A, 4B, 4E. On appeal to the Board, the appellant asserted, among other things, that there was “no just cause” for the action, the penalty was too harsh, and the agency committed harmful procedural

error. IAF, Tab 1 at 3, 6-7, and Tab 7. The appellant requested a hearing. *Id.*, Tab 1 at 4. The agency moved to dismiss the appeal for lack of jurisdiction, claiming that the appellant had filed a grievance regarding her removal before appealing to the Board, and therefore made a binding election under [5 U.S.C. § 7121\(e\)\(1\)](#) to proceed only under the grievance procedure. IAF, Tab 5, Subtab 1 at 4-5, and Tab 10. Thereafter, in a “Notice of Voluntary Dismissal,” the appellant’s attorney wrote that the appellant “voluntarily dismisses/withdraws her request for a hearing in this matter.” IAF, Tab 11 at 4. The attorney requested that the administrative judge “cancel the pre-hearing conference scheduled for December 10, 2008, as well as the hearing currently scheduled for December 29, 2008.” *Id.* In a subsequently-filed “Amended Notice of Voluntary Dismissal,” the appellant’s attorney asserted that the appellant “voluntarily dismisses/withdraws her appeal and request for a hearing in this matter.” IAF, Tab 12 at 4.

¶3 In an initial decision, the administrative judge dismissed the appeal, finding that “[t]he appellant requested that her appeal be voluntarily dismissed which I construe as a withdrawal of her appeal.” IAF, Tab 13 at 1-2.

ANALYSIS

¶4 The appellant’s attorney asserts on review in a declaration made under penalty of perjury that “[t]he undersigned mistakenly believed that the Appellant had agreed to dismiss her appeal prior to a ruling being made on the Agency’s motion to dismiss,” and that “[a]s is made plain in the Appellant’s affidavit . . . the Appellant did not knowingly authorize the dismissal of her appeal” Petition for Review at 4, Petition for Review File, Tab 1. The attorney contends that the dismissal of the appeal was involuntary and requests that the initial decision be vacated and the case remanded for further action. *Id.* at 5. The petition for review includes an affidavit from the appellant indicating that there was “a miscommunication between my counsel and me as it relates to our

response to the Agency’s motion, given that my counsel dismissed my appeal when I believed we would await a ruling on the motion to dismiss.” *Id.* at 6. The appellant avers that she was not aware that her appeal had been dismissed until she received a copy of the initial decision, and that she “immediately instructed my counsel to take whatever steps were necessary to have my appeal reinstated, so that a ruling on the Agency’s motion to dismiss can be made” *Id.* at 6-7.

¶5 The Board has held that it is generally appropriate to treat a request for reconsideration of an appellant-initiated dismissal of an appeal as a late-filed appeal or a request to reopen and reinstate a prior appeal. *Caracciolo v. Office of Personnel Management*, [86 M.S.P.R. 601](#), ¶ 3 (2000). Here, we will treat the appellant’s submission as a request to reopen her original appeal. *See id.* A case may be reopened in the interest of justice, particularly where the evidence is of such weight as to warrant a different outcome. *Id.*, ¶ 4. The Board will reopen a case only if the appellant has exercised due diligence in seeking reopening. *Id.* Because the appellant timely filed her petition for review only 33 days after her appeal was dismissed, we find that she has exercised due diligence in seeking reopening. *See id.*

¶6 An appellant’s decision to withdraw her appeal ordinarily will be accorded finality, and in the absence of unusual circumstances, the Board will not reinstate an appeal once the appellant has withdrawn it. *Zendejas v. Department of Homeland Security*, [107 M.S.P.R. 348](#), ¶ 6 (2007). A withdrawal based on misinformation or a misunderstanding, however, constitutes an exception to the general finality rule. *Id.* Moreover, although an appellant is bound by the errors of her chosen representative, when an appellant’s diligent efforts to prosecute her appeal are thwarted by her representative’s negligence or malfeasance, the appellant and her representative were not acting as one, and the representative’s negligence or malfeasance should not be attributed to the appellant. *Caracciolo*, [86 M.S.P.R. 601](#), ¶ 5. Here, the declaration submitted by the appellant’s attorney and the affidavit submitted by the appellant are uncontested, and therefore prove

the facts they assert. *See Schaefer v. U.S. Postal Service*, [42 M.S.P.R. 592](#), 595 (1989); *Woodall v. Federal Energy Regulatory Commission*, [30 M.S.P.R. 271](#), 273 (1986). Under these circumstances, we find that there was a miscommunication between the appellant and her attorney such that the appellant's diligent efforts to prosecute her appeal were thwarted by what appears to be her attorney's negligence. Furthermore, it is clear that the appellant and her attorney were not acting as one. We therefore find that the appellant has established that her appeal should be reinstated. *See Connolly v. Department of Homeland Security*, [99 M.S.P.R. 422](#), ¶¶ 6-7 (2005) (reinstating a withdrawn appeal where the appellant's attorney mistakenly withdrew the wrong appeal).

ORDER

¶7 Accordingly, the appellant's appeal of her removal is reinstated and remanded for further adjudication consistent with this Opinion and Order.*

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

* Given the miscommunication between the appellant and her attorney regarding how to proceed with the appeal, it is unclear whether the appellant expected her attorney to file a response to the agency's motion to dismiss. Therefore, the administrative judge should afford the appellant an opportunity on remand to respond to the agency's motion to dismiss. *See 5 C.F.R. § 1201.55*(b) (any objection to a written motion must generally be filed within 10 days from the date of service of the motion).