UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 150

Docket No. AT-0752-09-0330-I-1

John H. Nahoney,

Appellant,

v.

United States Postal Service,

Agency.

August 4, 2009

John H. Nahoney, Powell, Tennessee, pro se.

Jennifer C. Kellett, Esquire, Memphis, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the March 27, 2009 initial decision (ID) that dismissed his appeal. We DENY the appellant's PFR because it does not meet the criteria for review set forth at 5 U.S.C. § 1201.115. For the reasons set forth below, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118 and VACATE the ID. To the extent that the appellant is appealing his removal under the adverse action provisions of 5 U.S.C. chapter 75, we DISMISS the appeal as untimely filed with no good cause shown for the delay, and we DENY the appellant's implicit request to reinstate his prior withdrawn appeal of this same removal action. However, we REMAND this

appeal to the regional office for further adjudication regarding the appellant's claims under the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA).

BACKGROUND

¶2 Effective September 26, 2008, the agency removed the appellant, a preference eligible veteran, from his Electronic Technician position for alleged improper conduct. Initial Appeal File (IAF), Tab 6, Subtabs 4D-4E. On October 20, 2008, the appellant filed an appeal of his removal with the Board. *Id*., Subtab 4C at 1. The appellant subsequently informed the administrative judge (AJ) that he wanted to withdraw his appeal to challenge his removal through arbitration. *Id*. On December 18, 2008, the AJ issued an ID dismissing the appeal as withdrawn. *Id*. Neither party filed a timely PFR, and on January 22, 2009, the ID became final. *Id*. at 2. The appellant, through his union, pursued a grievance contesting his removal. IAF, Tab 6, Subtab 4B. On February 6, 2009, after a hearing, an arbitrator denied the appellant's grievance. *Id*. at 1, 8, 10-11.

¶3 On February 22, 2009, the appellant filed the instant appeal, again challenging his September 26, 2008 removal, and he requested a hearing. IAF, Tab 1 at 2-3. The appellant contended that he was wrongfully terminated and that the agency violated the Family and Medical Leave Act of 1993 (FMLA). *Id*. at 5. He further contended that the agency's actions were punitive and unlawful on other grounds. *Id*. In addition, he indicated on the appeal form that he wanted to file a veterans' preference claim or a VEOA appeal. *Id*. at 4, 6-7. He did not indicate, however, whether he had filed a VEOA complaint with the Department of Labor. *Id*. at 7.

¶4 The AJ issued a timeliness order explaining that it appeared that he had filed his appeal 119 days late, and she ordered the appellant to file evidence and argument showing that the appeal was timely or that good cause existed for the

delay. IAF, Tab 3 at 3-5. The AJ also issued a jurisdictional order explaining that the Board may lack jurisdiction over his appeal because he previously filed, and then withdrew, his first removal appeal. IAF, Tab 4 at 1. The AJ gave the appellant 15 days from the date of her order to set forth circumstances in support of reinstating his appeal. *Id.* The order did not mention VEOA.

¶5 The appellant did not respond to the orders on timeliness or jurisdiction. In its response to the orders, the agency asserted that the appeal should be dismissed for lack of jurisdiction or as untimely. IAF, Tab 6, Subtab 1 at 4-5. The agency argued that the appellant voluntarily withdrew an appeal of this same removal action and that, following an unfavorable arbitration decision, he filed this appeal several months after the effective date of his removal because he wanted "a second bite of the apple." *Id.* at 5.

¶6 Without holding the requested hearing, the AJ issued an ID, dismissing the appeal as untimely filed without good cause for the delay and finding no good cause for reopening the previous appeal. IAF, Tab 8, Initial Decision (ID) at 2-3. The AJ did not address the appellant's VEOA claim or rule on the jurisdictional issue.

¶7 The pro se appellant filed a PFR in which he reiterates his claim that the agency violated the FMLA. Petition for Review File (PFRF), Tab 1 at 4. The agency has not filed a response to the PFR.

ANALYSIS

¶8 On PFR, the appellant's contention that the agency violated the FMLA does not show that the AJ erred in dismissing his removal appeal as untimely filed. *Id.* He has not made any argument establishing error by the AJ, or presented any new and material evidence affecting the outcome of this case. *See* 5 C.F.R. § 1201.115(d)(1)-(2). We therefore deny the PFR.

¶9 We reopen this case on our own motion, however, and vacate the ID because it is based, in part, on the AJ's determination that the appellant failed to

establish good cause for reinstating his prior appeal. ID at 3. The AJ lacks the authority to reopen or reinstate appeals in which there has been a final Board decision; that authority is reserved to the Board. 5 U.S.C. § 7701(e)(1)(B); *Robey v. U.S. Postal Service*, 105 M.S.P.R. 539, ¶ 10, *aff'd*, 253 F. App'x 933 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1925 (2008); 5 C.F.R. §§ 1201.112, 1201.118.

The appellant's February 22, 2009 appeal is an untimely appeal of his September 26, 2008 removal, and he has not shown good cause for the delay.

¶10 Where an appellant has filed a second appeal after withdrawing his first one, it is generally appropriate to consider the second appeal as a new, late-filed appeal and to determine whether good cause has been established for waiving the filing deadline. *Robey*, 105 M.S.P.R. 539, ¶ 11. Therefore, we now consider whether the appellant established good cause for waiving the deadline for filing this new, late-filed appeal of his removal under the adverse action provisions of 5 U.S.C. chapter 75.

¶11 Generally, an appeal must be filed within 30 days after the effective date of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b); *see Robey*, 105 M.S.P.R. 539, ¶ 13. The appellant was removed effective September 26, 2008, and he acknowledged that he received the removal decision on September 29, 2008. IAF, Tab 1 at 3, Tab 6, Subtab 4D at 1. Thus, the deadline for filing a timely appeal was October 29, 2008, and his February 22, 2009 appeal was almost 4 months late. *See* 5 C.F.R. § 1201.22(b); *see also Gulley v. Department of the Treasury*, 101 M.S.P.R. 48, ¶ 9 (2006) (a filing delay of almost 4 months "is hardly minimal," even considering the appellant's pro se status).

¶12 The Board may waive the filing deadline if the appellant shows a good reason for the delay. *See* 5 C.F.R. § 1201.22(c). To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). To determine whether

good cause is shown, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether the appellant is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his appeal. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶13 The AJ notified the appellant of the timeliness issue below and what he needed to show to prevent the Board from dismissing his appeal as untimely. IAF, Tab 3. The AJ also gave the appellant the opportunity to respond to the timeliness issue, but he did not do so. ID at 2. Further, on PFR, the appellant does not set forth any reason for the untimely filing of his appeal. PFRF, Tab 1 at 3-4.

¶14 His election to pursue his grievance through negotiated grievance-arbitration procedures before filing his February 22, 2009 appeal does not constitute good cause for waiving the time limit for filing a Board appeal. *See McNeil v. U.S. Postal Service*, 98 M.S.P.R. 18, ¶ 10 (2004); *Muse v. U.S. Postal Service*, 82 M.S.P.R. 164, ¶ 11 (1999). Further, the appellant does not have a right to request that the Board review the final grievance decision, and thus the date of the arbitration award does not determine the timeliness of this appeal. *See McNeil*, 98 M.S.P.R. 18, ¶ 9; *Muse*, 82 M.S.P.R. 164, ¶ 7. Thus, we find that the appellant failed to show good cause to waive the deadline for filing his removal appeal under 5 U.S.C. chapter 75.

The appellant has not established a basis for reopening or reinstating his first removal appeal.

¶15 We also decline to exercise our discretion to reopen or reinstate the appellant's original removal appeal. *See Robey*, 105 M.S.P.R. 539, ¶ 20; *McNeil*, 98 M.S.P.R. 18, ¶ 14; 5 C.F.R. § 1201.118. Absent unusual circumstances such

as misinformation or new and material evidence, the Board will not reopen or reinstate an appeal once it has been withdrawn merely because the appellant now wishes to proceed before the Board. *E.g.*, *Robey*, 105 M.S.P.R. 539, ¶ 20. The AJ gave the appellant the opportunity to set forth any unusual circumstances that would allow the Board to reinstate his appeal, but he did not respond. IAF, Tab 4. The appellant does not dispute that he voluntarily withdrew his first Board appeal to challenge his removal through the arbitration process, as indicated in the ID that dismissed his first appeal. IAF, Tab 6, Subtab 4C. Additionally, he does not allege that the AJ erred in dismissing his original appeal or that he withdrew his appeal because of misinformation or any other unusual circumstance. Moreover, the appellant has not submitted any new and material evidence. Under the circumstances, we will not reopen his previously withdrawn removal appeal. *See Robey*, 105 M.S.P.R. 539, ¶ 21; *McNeil*, 98 M.S.P.R. 18, ¶ 15.

Remand is required to address the appellant's claims under USERRA and VEOA.

¶16 Had the appellant timely filed his removal appeal, the AJ could have properly adjudicated his VEOA claim as an affirmative defense. *See Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006), *aff'd*, No. 2006-3327 (Fed. Cir. Mar. 9, 2007) (NP). However, the Board has held that, where an appellant raises VEOA or USERRA as an affirmative defense in an appeal of an adverse action that is either untimely or not within the Board's jurisdiction, the Board should consider the appellant's allegations that an adverse action was taken in violation of USERRA or VEOA as separate claims. *Livingston v. Office of Personnel Management*, 105 M.S.P.R. 314, ¶ 13, *review dismissed*, 226 F. App'x 1001 (Fed. Cir. 2007); *see Aguilar*, 102 M.S.P.R. 102, ¶ 8.

¶17 Here, the appellant expressly indicated that he wanted to file a veterans' preference claim with his appeal, and he completed the VEOA section of his appeal form, although he provided no explanation for the basis of this claim. IAF, Tab 1 at 4, 6-7. He also listed his military service and claimed that he was

entitled to veterans' preference. *Id*. at 1, 6. Thus, we find that the appellant asserted a VEOA claim. *See Aguilar*, 102 M.S.P.R. 102, ¶ 8.

¶18 The AJ should have provided the appellant with adequate notice of what is required to establish the timeliness of and the Board's jurisdiction over his allegation that the agency violated veterans' preference laws as a "stand-alone" claim. *See Henson v. U.S. Postal Service*, 110 M.S.P.R. 624, ¶ 11 & n.7 (2009); *Livingston*, 105 M.S.P.R. 314, ¶ 13; *Aguilar*, 102 M.S.P.R. 102, ¶ 8; *see also Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 645-47 (Fed. Cir. 1996) (the Board must afford an appellant a full and fair opportunity to litigate the timeliness issue); *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). The time limits for filing a VEOA appeal and a chapter 75 adverse action appeal are different. *Compare* 5 C.F.R. § 1208.22 *with* 5 C.F.R. § 1201.22(b). However, the AJ did not provide notice of the jurisdictional or timeliness requirements regarding the VEOA claim, and she did not address the VEOA claim in the ID. *See Smyth v. U.S. Postal Service*, 85 M.S.P.R. 549, ¶¶ 6-8 (2000) (remanding where the AJ failed to analyze the appellant's VEOA claim in her ID). Therefore, we remand this appeal to allow the AJ to provide the appropriate jurisdictional and timeliness notice regarding the appellant's VEOA claim as a stand-alone appeal.

¶19 Further, this pro se appellant may be attempting to raise a USERRA claim rather than a VEOA claim. *See Henson*, 110 M.S.P.R. 624, ¶¶ 9-10 (remanding for further adjudication concerning a potential USERRA claim, even though the appellant never explicitly raised such a claim and only completed sections of the initial appeal form pertaining to VEOA). USERRA does not impose a time limit for filing an appeal with the Board. *Muse*, 82 M.S.P.R. 164, ¶ 14; 5 C.F.R. § 1208.12. Accordingly, on remand, the AJ should also provide the appellant with adequate notice of what is required to establish Board jurisdiction under USERRA. *See, e.g., Henson*, 110 M.S.P.R. 624, ¶¶ 9-10.

¶20 Under the circumstances of this appeal, where the appellant's otherwise appealable action was untimely filed, the Board is exercising its jurisdiction over the appeal as complaints under 38 U.S.C. §§ 4324(c)(1)-(2) and 5 U.S.C. § 3330a. *See Aguilar*, 102 M.S.P.R. 102, ¶ 10. Thus, the Board's jurisdiction to adjudicate the appellant's potential USERRA and VEOA complaints is no different from the jurisdiction it exercises in pure USERRA and VEOA cases where the appellant does not raise matters that may otherwise be appealed to the Board. *See id.* Accordingly, the Board's authority with regard to this complaint does not extend beyond the potential USERRA and alleged VEOA violations and does not allow for a decision on the merits of the appellant's removal, except where examination of those issues is necessary to address the appellant's USERRA and VEOA claims. *See id.*

ORDER

¶21 Accordingly, we REMAND this appeal to the regional office for further adjudication consistent with this Opinion and Order regarding the appellant's claims under VEOA and USERRA.

FOR THE BOARD:

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