

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

2009 MSPB 190

Docket No. DC-0752-09-0293-I-1

**Irene M. Moore,
Appellant,**

v.

**Department of Justice,
Agency.**

September 25, 2009

Irene M. Moore, Washington, D.C., pro se.

Melanie F. Jones, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed her appeal as barred by the election requirement for mixed cases under [5 U.S.C. § 7702\(a\)\(1\)-\(2\)](#) and its implementing regulations. For the following reasons, we DENY the petition for review because it does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#). However, we REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal to the Washington Regional Office for further adjudication.

BACKGROUND

¶2 The material facts are undisputed. On or about December 18, 2007, the agency proposed to remove the appellant from her Secretary position for several charges of misconduct. Initial Appeal File (IAF), Tab 8 at 5. On January 28, 2008, the appellant filed a complaint of employment discrimination (EEO complaint) with her agency claiming that she was harassed and subjected to a hostile work environment based on her race, sex, and age. IAF, Tab 3 at 5, 23. She also alleged that the agency retaliated against her for engaging in protected equal employment opportunity (EEO) activities. *Id.* By letter dated February 15, 2008, the agency informed the appellant of its decision to remove her effective February 22, 2008. IAF, Tab 8 at 5-10, Tab 3 at 2-3. On some unspecified date, she apparently amended her EEO complaint to add a claim of wrongful termination based on her February 22, 2008 removal. IAF, Tab 3 at 5, 25. On March 26, 2008, the agency's EEO staff notified the appellant that it had accepted her EEO complaint. *Id.* at 5.

¶3 On or about April 24, 2008, she appealed her removal to the Board and an administrative judge dismissed the appeal as untimely filed under [5 C.F.R. § 1201.22\(b\)](#).¹ Neither party informed the administrative judge of her pending EEO complaint. The full Board subsequently denied her petition for review of the initial decision for failure to meet the review criteria.² Thereafter, on May 8, 2009, the United States Court of Appeals for the Federal Circuit affirmed our decision.³

¹ *Moore v. Department of Justice*, MSPB Docket No. DC-0752-08-0462-I-1 (*Moore I*), Initial Appeal (Apr. 24, 2008), Initial Decision (May 8, 2008).

² *Moore I*, Final Order (Sept. 8, 2008).

³ *Moore v. Merit Systems Protection Board*, No. 2009-3032, 2009 WL 1262414 (Fed. Cir. May 8, 2009).

¶4 Meanwhile, on January 22, 2009, the agency issued a final decision denying the appellant’s request for relief on her mixed case EEO complaint.⁴ IAF, Tab 3 at 4-26. In its final decision, the agency notified the appellant that she had the right to appeal to the Board within 30 days of the date that she received the decision. *Id.* at 4. On February 3, 2009, she filed the instant appeal with the Board. IAF, Tab 1. On appeal, she again challenged the merits of her February 22, 2008 removal and requested a hearing. *Id.* at 3-4. Although she asserted that she was “forced for months to work in a hostile environment,” she did not identify a category of prohibited discrimination in connection with her removal or mention her EEO complaint. *Id.* at 5-6.

¶5 The administrative judge issued an acknowledgment order directing the appellant to show why the appeal should not be dismissed as untimely filed or as barred by the doctrine of res judicata. IAF, Tab 2 at 2-3. In response, the appellant filed a copy of the agency’s final decision denying her EEO complaint. IAF, Tab 3 at 4-26. In reply, the agency filed a motion to dismiss this case as an untimely appeal of her February 22, 2008 removal or, in the alternative, as barred by her prior appeal under the doctrine of collateral estoppel. IAF, Tab 5 at 2. Because the Board dismissed her prior appeal as untimely under its regulations, the agency conceded that it was not a decision “on the merits” entitled to res judicata effect. *Id.* at 1.

¶6 On March 4, 2009, the administrative judge issued a show cause order advising the parties that collateral estoppel did not apply “because the timeliness issue involved in the present appeal—whether the appeal was timely filed within

⁴ A mixed case complaint is a complaint of employment discrimination filed with a federal agency relating to or stemming from an action that can be appealed to the Board. *McCoy v. U.S. Postal Service*, 108 M.S.P.R. 160, ¶ 12 (2008); [29 C.F.R. § 1614.302\(a\)\(1\)](#). A mixed case appeal is an appeal filed with the Board alleging that an appealable agency action was effected because of discrimination. *McCoy*, 108 M.S.P.R. 160, ¶ 12; [29 C.F.R. § 1614.302\(a\)\(2\)](#).

30 days after the appellant received the agency's final EEO decision, under [5 C.F.R. § 1201.154\(b\)\(1\)](#) (2008)—was not involved in the prior Board appeal.” IAF, Tab 6 at 2. Instead, the administrative judge advised the parties that the appeal might be barred under [5 U.S.C. § 7702\(a\)\(1\)-\(2\)](#) and its implementing regulations, if the appellant's prior Board appeal constituted a valid election to challenge her removal through a direct Board appeal, rather than through the formal EEO complaint process with the agency. *Id.*

¶7 In the show cause order, the administrative judge also advised the parties as follows:

If the agency's final decision notice in the February 22, 2008, decision to remove the appellant from her Secretary position adequately notified her of the election requirement and the consequences of such an election, I will find that her prior Board appeal amounted to a valid election and the appeal will be dismissed on that basis. Absent such a showing, this matter will proceed as scheduled.

The agency is therefore ORDERED to submit evidence and argument to demonstrate that the appellant's prior appeal (MSPB Docket No. DC-0752-08-0462-I-1) amounted to a valid election of the direct Board procedure. . . . The appellant may file a response

Id. at 2-3.

¶8 In response, the agency filed another motion to dismiss the appeal with a copy of its February 15, 2008 removal decision letter advising the appellant of the exclusive nature of the election requirement in mixed cases. IAF, Tab 8 at 9-10. The agency argued that the appellant made a prior election of the direct Board appeal procedure; therefore, she was precluded from filing another appeal after exhausting the agency's EEO procedure. *Id.* at 2. The appellant did not address the election requirement issue in her response to the order. IAF, Tab 7.

¶9 On March 25, 2009, the administrative judge issued an initial decision granting the agency's motion to dismiss. IAF, Tab 9, Initial Decision (ID). The administrative judge found that the appeal was barred by the election requirement

for mixed cases under [5 U.S.C. § 7702\(a\)\(1\)-\(2\)](#) and its implementing regulations because the agency's removal decision letter properly informed the appellant about the consequences of electing the direct Board appeal procedure. ID at 1-5.⁵

¶10 The pro se appellant has filed a timely petition for review in which she challenges the merits of her removal and argues that her right to a hearing was denied. Petition for Review File (PFRF), Tab 1. In response, the agency argues that the Board should dismiss the petition as barred by the mixed case election requirement and for failure to meet the Board's review criteria. PFRF, Tab 3 at 4, 6.

ANALYSIS

¶11 On PFR, the appellant does not make any argument establishing legal error by the administrative judge or present any new and material evidence affecting the outcome of this case. We therefore deny the petition for review for failure to meet the review criteria. See [5 C.F.R. § 1201.115\(d\)\(1\)-\(2\)](#). We reopen the appeal because the initial decision was based, in part, on the erroneous assumption that the appellant's prior Board appeal precluded her from filing a subsequent Board appeal under the mixed case election requirements in [5 U.S.C. § 7702\(a\)\(1\)-\(2\)](#) and its implementing regulations. ID at 3-4.

The appellant made a valid election to file a formal EEO complaint with her agency, as amended to include her removal, before she appealed to the Board.

¶12 When an appellant has been subjected to an action that is appealable to the Board, and alleges that the action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, or age, she may initially file a mixed case complaint with her employing agency,

⁵ The initial decision also states that "the appellant's timely EEO complaint amounted to a valid election precluding a subsequent Board appeal under 5 C.F.R. § 1201.154(d) (2008)." ID at 4. The administrative judge's analysis, however, indicates that she actually intended to find that the appellant's prior Board appeal was a valid election that precluded her subsequent Board appeal under 5 C.F.R. § 1201.154(b).

or a mixed case appeal with the Board, but not both, and whichever is filed first is deemed to be an election to proceed in that forum. See [5 U.S.C. § 7702\(a\)](#); *McCoy v. U.S. Postal Service*, [108 M.S.P.R. 160](#), ¶ 12 (2008); [29 C.F.R. § 1614.302\(b\)](#); [5 C.F.R. § 1201.154\(a\)-\(b\)](#). An election is not valid unless the agency has properly informed the appellant of the election requirement and its consequences. See *McCoy*, [108 M.S.P.R. 160](#), ¶ 14; *Dawson v. U.S. Postal Service*, [45 M.S.P.R. 194](#), 197 (1990).

¶13 Here, the agency's removal decision notice clearly informed the appellant that she could either file an appeal with the Board or file an EEO complaint. The order stated, in part:

If you appeal this decision, you must elect to do so under only one procedure. You are considered to have made an election when you timely file, in writing, an appeal with the MSPB or a formal EEO complaint. If you file under more than one procedure, the procedure under which you timely file first shall be considered to be your elected procedure.

IAF, Tab 8 at 10. Accordingly, we agree with the administrative judge's finding that the agency duly informed the appellant of the consequences of her election. ID at 4.

¶14 We also find that the appellant made an informed election to amend her EEO complaint to include her removal before she filed her Board appeal. See *Gray v. U.S. Postal Service*, [93 M.S.P.R. 161](#), ¶¶ 11-12 (2002) (in determining whether an appellant's EEO complaint encompasses her removal, the Board looks to the appellant's complaint, the agency's treatment of and processing of the claim, and the surrounding circumstances). Here, the record reveals that the appellant filed her formal EEO complaint with the agency on January 28, 2008, before her removal. IAF, Tab 3 at 2, 5. As noted above, the agency advised the appellant in the February 15, 2008 removal decision notice that if she filed under more than one procedure, the procedure under which she timely filed first would effectively be her election. IAF, Tab 8 at 10. Thereafter, on March 26, 2008, the

agency notified the appellant that it had accepted her EEO complaint. IAF, Tab 3 at 5. All of these events transpired before she filed her prior Board appeal.

¶15 Unfortunately, the appellant's EEO complaint is not in the record, and we cannot determine the exact date that she amended her complaint to add the removal action. However, the agency's final decision on the EEO complaint and submissions in this appeal indicate that the appellant added her wrongful termination claim to her EEO complaint before the agency accepted the complaint for investigation on March 26, 2008. IAF, Tab 3 at 5; PFRF, Tab 3 at 5. Further, there is nothing in the record suggesting that the appellant amended her EEO complaint after she filed her first Board appeal in April 2008.

¶16 Moreover, if the agency had believed that the appellant elected to proceed directly to the Board before filing her mixed case EEO complaint on the same matter, the agency would have been required to dismiss her complaint and to advise her to bring her discrimination claims to the Board's attention under [29 C.F.R. § 1614.302\(c\)\(2\)\(i\)](#). That clearly did not happen here. Instead, the agency accepted her mixed case EEO complaint, completed its investigation, and issued the final decision denying her request for relief. IAF, Tab 3 at 4-26; *cf. Wilkerson v. U.S. Postal Service*, EEOC No. 01941367, 1994 WL 1755613, at *2 (Apr. 5, 1994) (where an agency initially accepted a formal EEO complaint and subsequently learned that the former employee had first elected to appeal his removal action directly to the Board, the agency's decision to dismiss the complaint without completing its investigation was proper under EEOC regulations).

¶17 Thus, based on the totality of circumstances, we find that the appellant made a valid election to pursue her January 28, 2008 EEO complaint, as amended to include her removal, before filing her prior Board appeal in April 2008. Moreover, because the appellant has now exhausted the agency's EEO procedure, we also find that she has a right to appeal from the agency's final decision to the Board under [5 C.F.R. § 1201.154\(b\)\(1\)](#).

The appellant's prior Board appeal was premature under [5 C.F.R. § 1201.154\(c\)](#). Accordingly, that appeal does not preclude her subsequent appeal from the final agency decision on her EEO complaint under 5 C.F.R. § 1201.154(b)(1).

¶18 Regardless of whether an employee elects to file a direct Board appeal under [5 C.F.R. § 1201.154\(a\)](#), or elects to file a Board appeal after filing a discrimination complaint and exhausting the agency EEO procedure under [5 C.F.R. § 1201.154\(b\)](#), she is entitled to the same de novo review before the Board, including the right to a hearing. *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 341 (1995). However, she may not file a Board appeal under [5 C.F.R. § 1201.154\(b\)](#), upon exhausting the agency EEO procedure, if she has previously made a valid election of the direct Board procedure. *Peartree*, 66 M.S.P.R. at 341. Having found that the appellant has exhausted the agency's EEO procedure and has a right to appeal to the Board, the remaining issue is whether her prior appeal precludes the instant appeal.

¶19 Because the appellant elected to pursue her agency's EEO procedure, she was required to wait 120 days from the date that she filed her formal EEO complaint or until the agency issued its final decision before appealing to the Board. [5 C.F.R. § 1201.154\(b\)\(2\)](#). Yet the appellant filed her first Board appeal before it was ripe for adjudication under [5 C.F.R. § 1201.154\(b\)\(2\)](#). Ordinarily, the Board would have dismissed her appeal as premature without prejudice to its later refile in accordance with 5 C.F.R. § 1201.154(c), instead of dismissing her appeal as untimely under 5 C.F.R. § 1201.22. *See, e.g., Summerset v. Department of the Navy*, [100 M.S.P.R. 292](#), ¶ 8 (2005).

¶20 The Board's records reflect, however, that neither the agency nor the appellant informed the Board during the prior appeal that she raised discrimination claims in connection with her removal or that she had filed an EEO complaint.⁶ As a direct consequence of the parties' omissions in the prior

⁶ *See Moore I*, Initial Appeal (Apr. 24, 2008), Appellant's Response re: timeliness (May 7, 2008), Petition for Review (June 3, 2008), Agency's Response to Petition for Review

appeal, the appellant was not advised of the elements of proof necessary to prove timeliness in mixed case appeals under [5 C.F.R. § 1201.154\(b\)](#).⁷

¶21 Under the circumstances, we find that her prior Board appeal did not constitute a valid election of a direct Board procedure precluding her subsequent appeal under [5 C.F.R. § 1201.154\(b\)](#). As set forth above, the appellant made an informed election to pursue the agency's EEO procedure before she prematurely filed her prior Board appeal. Accordingly, we find that her prior appeal did not preclude her from subsequently filing this appeal under 5 C.F.R. § 1201.154(b)(1), upon receiving the agency's final decision on her mixed case EEO complaint.

This appeal was timely filed under [5 C.F.R. § 1201.154\(b\)\(1\)](#) and is not barred under the doctrines of collateral estoppel or res judicata.

¶22 Because the agency issued its final decision on her EEO complaint on January 22, 2009, and she filed this appeal less than 30 days later on February 3, 2009, we find that it was timely filed under [5 C.F.R. § 1201.154\(b\)\(1\)](#). Additionally, we agree with the administrative judge's finding that the doctrine of collateral estoppel does not apply because the timeliness issue in this appeal, i.e., timeliness under [5 C.F.R. § 1201.154\(b\)\(1\)](#), was not adjudicated in the prior Board appeal. ID at 3; *see, e.g., Peartree*, 66 M.S.P.R. at 341. Moreover, as the agency conceded below, our dismissal of her prior appeal as untimely under 5 C.F.R. § 1201.22 was not a decision "on the merits" entitled to res judicata effect so as to bar the present appeal. IAF, Tab 5 at 1; *see, e.g., Peartree*, 66 M.S.P.R. at 340.

(June 30, 2008). The Board may take official notice of matters that can be verified, including documents or actions in other Board appeals. 5 C.F.R. § 1201.64; *see Woodjones v. Department of the Army*, 89 M.S.P.R. 196, ¶ 15 (2001).

⁷ *Moore I*, Acknowledgment Order (May 1, 2008).

¶23 Thus, we find that the appellant's prior appeal does not bar this timely appeal from the agency's final decision on the appellant's mixed case EEO complaint.

ORDER

¶24 Accordingly, we VACATE the initial decision and REMAND this appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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