

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

**2010 MSPB 36**

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Docket No. DA-0432-09-0671-I-1

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**Victor Galvan,  
Appellant,**

**v.**

**Equal Employment Opportunity Commission,  
Agency.**

February 19, 2010

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John E. Richards, Esquire, Dallas, Texas, for the appellant.

Jason Hegy, Washington, D.C., for the agency.

John F. Sherlock, III, Esquire, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision that dismissed his removal appeal as premature. For the reasons set forth below, we REOPEN the appeal under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND the appeal for further adjudication.

**BACKGROUND**

¶2 The appellant was employed by the agency as an Investigator, GS-12. Initial Appeal File (IAF), Tab 1 at 1. On October 15, 2008, the agency proposed

his removal for unacceptable performance. *Id.* at 35-47. On July 24, 2009, after the appellant had an opportunity to respond to the proposed removal both orally and in writing, the agency issued a decision letter removing him effective August 7, 2009. *Id.* at 16-34. The decision letter informed the appellant of his right to file a Board appeal, a grievance, or an equal employment opportunity (EEO) complaint challenging his removal. *Id.* at 33-34.

¶3 On August 27, 2009, the appellant's attorney sent an e-mail to an attorney in the agency's Office of Equal Opportunity in which he stated, "I assume that now the final decision issued to [the appellant] is folded into the charge [you] are investigating since it is the culmination of the notice [of] proposed removal." IAF, Tab 8 at 13. The agency attorney responded, "Yes, you are correct." *Id.*

¶4 On the same day as the e-mail exchange described above, the appellant filed the present Board appeal challenging his removal. IAF, Tab 1. He requested a hearing. *Id.* at 2. He alleged that the agency committed harmful procedural error and prohibited personnel practices, and that its action was not in accordance with law. *Id.* at 4, 6, 8. He also alleged that his removal constituted discrimination on the basis of sex and national origin, and reprisal for whistleblowing. *Id.* at 4, 7, 9-12.

¶5 The agency moved to dismiss the appeal, arguing that the appellant had elected to file an EEO complaint challenging his removal and was therefore precluded from also filing a Board appeal challenging the same action under [29 C.F.R. § 1614.302\(b\)](#). IAF, Tab 8 at 6-8. The agency further argued that, because the appellant had filed an EEO complaint challenging his removal, he could not file a Board appeal until either the agency had issued a final decision or 120 days had passed since the filing of his EEO complaint. *Id.* at 8-9. The appellant responded that he did not file an EEO complaint concerning his removal and that the Board therefore had jurisdiction over his appeal. IAF, Tab 11. He argued that the August 27, 2009 e-mail from his attorney to the agency was merely an inquiry and did not constitute an election to pursue an EEO complaint

concerning his removal. *Id.* at 7-8. He argued, in the alternative, that 120 days had passed since the filing of his EEO complaint. *Id.* at 8.

¶6 On October 16, 2009, the administrative judge issued an initial decision dismissing the appeal as premature. IAF, Tab 17. He found that the appellant had filed an EEO complaint challenging his removal before he filed the present Board appeal. *Id.* at 3. He further found the agency had not issued a final decision on the EEO complaint and 120 days had not passed since the filing of the complaint. *Id.*

¶7 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. On petition for review, he restates the arguments he made in response to the agency's motion to dismiss. *Id.* The agency has responded in opposition to the petition for review. PFR File, Tab 3.

#### ANALYSIS

¶8 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, he may initially file a mixed case complaint with his employing agency, 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\(a\)](#); *Moore v. Department of Justice*, [112 M.S.P.R. 382](#), ¶ 12 (2009). The parties dispute which procedural option the appellant elected.

¶9 If the appellant is correct that he validly elected to pursue a Board appeal, rather than the agency's EEO procedure, the appeal would have been within the Board's jurisdiction upon its filing. However, we find that, due to the passage of time since the filing of the appeal, the Board has jurisdiction over the appeal even if the appellant elected to pursue the agency's EEO procedure. Where an employee elects to pursue his agency's EEO procedure, he is required to wait 120 days from the date that he filed his formal EEO complaint or until the agency

issued its final decision before appealing to the Board. [5 C.F.R. § 1201.154\(b\)\(2\)](#). Even if the August 27, 2009, e-mail from the appellant's attorney to the agency constituted a valid election to pursue the agency's EEO procedure to challenge his removal, more than 120 days have passed since that date, and therefore the Board now has jurisdiction over the appeal. *See Summerset v. Department of the Navy*, [100 M.S.P.R. 292](#), ¶¶ 8-9 (2005) (finding that an appeal was properly dismissed as premature by the administrative judge, but forwarding the appeal for further adjudication because more than 120 days had elapsed since the filing of the formal EEO complaint by the time the Board issued its decision). We therefore need not determine whether the e-mail constituted a valid election.\* 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), he 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).

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\* For the same reason, we need not address the appellant's alternative argument that the 120-day period began to run prior to August 27, 2009. *See* IAF, Tab 11 at 8.

ORDER

¶10 Accordingly, we REMAND the appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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