UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 56

Docket No. AT-0752-09-0691-I-1

Eric Wiggins,

Appellant,

v.

Department of the Air Force,

Agency.

March 23, 2010

Eric Wiggins, Lexington, South Carolina, pro se.

Jon B. Stanley, Charleston AFB, South Carolina, for the agency.

Shawna Thompson, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal for failure to prosecute. For the reasons discussed below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The agency removed the appellant from his WG-2892-10 Aircraft Electrician position, effective May 8, 2009. Initial Appeal File (IAF), Tab 5 at

18-21. The appellant, who is pro se, filed an appeal of the agency's removal action and requested a hearing. IAF, Tab 1 at 2-3. On appeal, he claimed that the agency engaged in various prohibited personnel practices and committed prohibited discrimination based on race and color. *Id*. at 4-6. During a status conference, the appellant also indicated that he wanted to file a whistleblower claim. IAF, Tab 7 at 1 n.1.

¶3 The administrative judge issued an order directing the appellant to identify the factual bases for his affirmative defenses and requiring the agency to respond. IAF, Tab 7. Recognizing that responding to the order would "be time consuming for both parties," the administrative judge set forth the elements of the appellant's affirmative defenses and ordered the parties to respond by identifying certain specific information. *Id.* at 2-5. The administrative judge also advised the appellant that his affirmative defenses might not be considered if he failed to respond to the order. *Id.* at 5-6. The appellant filed three timely, but incomplete, responses to the administrative judge's order. IAF, Tabs 8-10. The agency responded by claiming that the appellant's submissions were non-responsive and asking the administrative judge to deny the appellant's affirmative defenses. IAF, Tab 13 at 5-6. The administrative judge did not directly rule on the agency's request. Instead, he focused on a discovery dispute between the parties.

¶4 Following the issuance of the acknowledgment order, IAF, Tab 2, the agency served the appellant with discovery requests, consisting of interrogatories and a request for production of documents, on June 29, 2009. IAF, Tab 12. The appellant did not respond to the discovery requests, however, and the agency filed a motion to compel discovery on July 27, 2009. IAF, Tab 11. The administrative judge attempted to resolve the discovery dispute by holding an unscheduled telephone conference with the parties to discuss the motion to compel. IAF, Tab 14 at 1. The administrative judge was unable to reach the appellant by telephone and left a message directing the appellant to return his call. *Id.* Because the appellant did not return the administrative judge's call, he granted the agency's

motion to compel on July 28, 2009, before the 10-day period for the appellant to respond had expired. *Id*. In granting the motion, the administrative judge ordered the appellant to respond to the agency's discovery requests no later than the close of business on August 3, 2009, and advised the appellant that failure to comply with this order could result in severe sanctions. *Id*. at 2. The appellant, however, never responded to the agency's discovery requests.

¶5 The administrative judge also ordered the parties to file their prehearing submissions by August 5, 2009, and to attend a telephonic prehearing conference on August 10, 2009. IAF, Tab 3 at 2-3. Although the agency filed its prehearing submission, IAF, Tab 15, the appellant did not. The administrative judge unsuccessfully tried to contact the appellant by telephone to conduct the prehearing conference scheduled for August 10.[*] IAF, Tab 3 at 3, Tab 16, Initial Decision (ID) at 2-3. Instead, on August 10, 2009, the administrative judge issued an initial decision dismissing the appeal for failure to prosecute. ID at 1, 3. The administrative judge found that, despite the appellant's incomplete responses to his order on affirmative defenses, the appellant had failed to respond to any other order, and he had failed to return telephone calls to resolve issues in his appeal. ID at 3. On that basis, the administrative judge found that it served the interest of justice to dismiss the appeal for failure to prosecute. *Id*.

¶6 The appellant has filed a petition for review. Petition for Review File (PFRF), Tab 1. The agency has filed a response opposing the petition for review and asking the Board to dismiss the petition as untimely filed by 4 minutes. PFRF, Tab 4.

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[*] In the initial decision, the administrative judge asserts that he attempted to call the appellant on August 8, 2009; this appears to be a typographical error because that date was a Saturday. IAF, Tab 16 at 3. For the sake of argument, we have assumed that the administrative judge unsuccessfully attempted to contact the appellant on August 10, 2009, the scheduled conference date.

ANALYSIS

The timeliness of the petition for review.

¶7 A review of the Board's electronic appeal pleading event log shows that the appellant attempted to create a new pleading on the electronic filing (e-filing) section of the Board's website four times between September 10 and 14, 2009. *See Lamb v. Office of Personnel Management*, 110 M.S.P.R. 415, ¶ 7 (2009) (taking notice of the Board's event log activity in a timeliness analysis of an appeal submitted through the e-filing system). Although the appellant created his final petition at 11:13 p.m. on September 14, 2009, the day of the filing deadline, he did not complete the electronic submission until 12:04 a.m. on September 15, 2009. ID at 3; PFRF, Tab 1; *see* 5 C.F.R. § 1201.114(d) ("Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision."). We find, therefore, that he filed his petition 4 minutes late. *See* 5 C.F.R. § 1201.4(l) ("The date of filing by e-filing is the date of electronic submission."). Upon exiting the e-filing system, it appears that the appellant was not informed that his petition was untimely filed and that he was required to submit a motion showing good cause for the untimely filing with a sworn statement or affidavit. *See* 5 C.F.R. § 1201.114(f).

¶8 The Board will waive its filing deadline only upon a showing of good cause for the delay in filing. *Livingston v. Office of Personnel Management*, 105 M.S.P.R. 314, ¶ 6 (2007); 5 C.F.R. § 1201.114(f). In the absence of a motion showing good cause for an untimely filing, the Board may exercise its discretion to decide the issue based on the existing record. 5 C.F.R. § 1201.114(f). To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). In making a good cause determination, the Board will consider the length of the delay, the

reasonableness of his excuse and his showing of due diligence, whether he 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 petition. *Rodgers v. U.S. Postal Service*, 105 M.S.P.R. 297, ¶ 6 (2007).

¶9 Under the particular circumstances of this case, we find good cause for the minimal filing delay based on the Board's event log showing this pro se appellant's efforts to make a timely electronic filing, notwithstanding his failure to complete all of the steps necessary for electronic submission until 4 minutes after the deadline. *See Livingston*, 105 M.S.P.R. 314, ¶ 9; *Rodgers*, 105 M.S.P.R. 297, ¶¶ 7-9; *Social Security Administration v. Price*, 94 M.S.P.R. 337, ¶ 7 (2003) (the agency exercised due diligence and showed good cause for filing the petition for review 34 minutes late where its attorney began sending the petition via facsimile on the due date but had technical problems with her facsimile machine), *aff'd*, 398 F.3d 1322 (Fed. Cir. 2005); *cf. Miles v. Department of Veterans Affairs*, 84 M.S.P.R. 418, ¶ 9 (1999) (finding that the appellant's 8-minute delay in responding to the agency's interrogatories was so insignificant that her submission was deemed timely made). Because we find good cause for the untimely filing and the agency has not alleged that it was prejudiced by the 4-minute filing delay, we find that waiver of the filing deadline is appropriate. *See Price*, 94 M.S.P.R. 337, ¶ 7.

The administrative judge abused his discretion by dismissing this appeal for failure to prosecute.

¶10 In his pro se petition for review, the appellant contends that the dismissal did not serve the interest of justice because he did not abandon his appeal. PFRF, Tab 1 at 4. Additionally, he states that his scanner failed to upload "the entire file" into the Board's e-filing system, and he attaches forty-four pages of documents to his petition. *Id*. at 3-4, 6-49. He also asserts that he was confused

by the appeal process because he was simultaneously pursuing "EEO, IG, and Congressional complaints." *Id*. at 3.

¶11 An administrative judge may impose sanctions against a party as necessary to serve the ends of justice. *Holland v. Department of Labor*, 108 M.S.P.R. 599, ¶ 9 (2008); 5 C.F.R. § 1201.43. The sanction of dismissal with prejudice may be imposed if a party fails to prosecute or defend an appeal. *Holland*, 108 M.S.P.R. 599, ¶ 9. An administrative judge should not resort to the imposition of sanctions, however, unless necessary to serve the ends of justice. *Id*. The severe sanction of dismissal with prejudice for failure to prosecute should not be imposed against a pro se appellant who has made incomplete responses to the Board's orders, but has not exhibited bad faith or evidenced any intent to abandon his appeal. *Id*. Nevertheless, absent a showing of abuse of discretion, the Board will not reverse an administrative judge's determination regarding sanctions. *Id.*

¶12 Although the appellant has not been diligent in pursuing his appeal, and he did not comply with the administrative judge's July 28, 2009 order regarding discovery, his actions do not exhibit bad faith or evidence an intent to abandon his appeal. While the appellant was unavailable for the telephonic prehearing conference the administrative judge held on August 10, 2009, he participated in the telephonic status conference held on July 13, 2009. IAF, Tab 7 at 1 n.1. He also asserted affirmative defenses, even if in a summary fashion, and filed three timely responses to the administrative judge's order on affirmative defenses. IAF, Tab 1 at 4-6, Tabs 8-10; *see Simon v. Department of Commerce*, 111 M.S.P.R. 381, ¶ 15 (2009). We find that his responses to the administrative judge's order, while duplicative and incomplete, represented a good faith effort by this pro se appellant to comply with the order. We also note that the agency, in its response to the appellant's filings on his affirmative defenses, did not suggest the extreme sanction imposed by the administrative judge. Instead, the agency asked the administrative judge to deny the appellant's affirmative defenses. IAF, Tab 13 at 6; *see Simon*, 111 M.S.P.R. 381, ¶ 15.

¶13 The administrative judge's frustration with the appellant is understandable. The appellant failed to obey the administrative judge's order compelling him to submit his discovery responses by August 3, 2009. IAF, Tab 14 at 2. The appellant also failed to obey the administrative judge's June 12, 2009 order requiring him to file a prehearing submission. IAF, Tab 3 at 2. Nonetheless, the administrative judge never specifically warned the appellant that he intended to dismiss the appeal for lack of prosecution and, based on the record, we find no evidence that the appellant exhibited bad faith or intended to abandon his appeal. *See Holland*, 108 M.S.P.R. 599, ¶ 10.

¶14 We therefore find that the extreme sanction of dismissal for failure to prosecute, which denied the appellant an opportunity for review of his appeal on the merits, does not serve the ends of justice. *See Simon*, 111 M.S.P.R. 381, ¶¶ 10, 14-15 (finding that the administrative judge abused her discretion by striking the appellant's affirmative defenses based upon the appellant's non-compliance with discovery orders); *Holland*, 108 M.S.P.R. 599, ¶¶ 10, 12 (the extreme sanction of dismissal for failure to prosecute did not serve the ends of justice where there was no evidence of bad faith or an intent to abandon the appeal); *Tully v. Department of Justice*, 95 M.S.P.R. 481, ¶¶ 10, 12 (2004) (vacating an administrative judge's dismissal for failure to prosecute because the sanction was too severe although the pro se appellant had twice failed to file prehearing submissions and to appear for prehearing conferences).

¶15 In remanding this appeal, we note that appellants are expected to comply with all orders issued by the Board's administrative judges. *See Lubert v. U.S. Postal Service*, 110 M.S.P.R. 430, ¶ 15 (2009). Moreover, an administrative judge may impose various sanctions when a party fails to comply with an order. *See* 5 C.F.R. § 1201.43(a). Accordingly, on remand, the appellant must be more diligent in complying with the administrative judge's orders and in pursuing his appeal to avoid the imposition of sanctions as necessary to serve the ends of justice. *Lubert*, 110 M.S.P.R. 430, ¶ 15; *Tully*, 95 M.S.P.R. 481, ¶ 14.

ORDER

¶16 Accordingly, we remand this case to the Atlanta 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.