UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 97

Docket No. SF-0752-09-0875-I-1

Othel L. Bradshaw,

Appellant,

v.

Department of Veterans Affairs,

Agency.

May 28, 2010

Othel L. Bradshaw, Los Angeles, California, pro se.

Arnulfo Urias, Esquire, Los Angeles, California, 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 the initial decision that dismissed his appeal as untimely filed with no good cause shown for the filing delay. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND this appeal for further adjudication as set forth in this Opinion and Order.

BACKGROUND

¶2 The appellant was a WG-2/5 Housekeeping Aid with the agency's Greater Los Angeles Health Care System. Initial Appeal File (IAF), Tab 1 at 2, Tab 3,

Subtab 4f. By letter dated May 24, 2006, the agency proposed to remove the appellant. IAF, Tab 3, Subtab 4i. The appellant provided a written response to the proposal notice. *Id.*, Subtab 4h. One year and one day after issuing the proposal notice, the agency issued a decision dated May 25, 2007, stating that it was removing the appellant effective June 3, 2007. *Id.*, Subtabs 4f-4g. The agency sent the decision to the address provided by the appellant on his written response to the proposal notice. *Id.*, Subtabs 4g at 1, 4h at 1.[1]

¶3 The appellant alleges that he attempted to appeal his removal on August 20, 2007, that as of that date he had yet to receive a copy of the removal decision, and that he had been prompted to file because he received a notice from the Thrift Savings Plan indicating that he had been separated on June 3, 2007. IAF, Tab 5, Ex. C at 4-5. The Board's records do not indicate that the regional office docketed an appeal, and according to the appellant, the regional office returned his submission with instructions that he resubmit his appeal with a copy of the decision notice or an SF-50. *Id.*

¶4 The appellant filed an appeal on March 1, 2008, that was treated as a claim for restoration following a compensable injury under 5 U.S.C. ch. 81 and not as an appeal from a removal under 5 U.S.C. ch. 75. The administrative judge dismissed the appeal for lack of jurisdiction, and on July 27, 2009, the full Board dismissed the appellant's petition for review as untimely filed with no good cause. *Bradshaw v. Department of Veterans Affairs*, 112 M.S.P.R. 70 (2009).

¶5 The appellant filed this appeal from his removal on August 6, 2009. IAF, Tab 1 at 21. He asserted that he had not received a copy of the removal decision until July 7, 2009, when he received it as part of the agency's response to his Freedom of Information Act request. *Id.* at 2, 7-13. The administrative judge ordered the appellant to show either that his appeal was timely filed or that good

[1] Although the record is not fully developed on this issue, it appears that the appellant may not have been at work since at least April 2006. IAF, Tab 3, Subtab 4b at 2.

cause existed for his untimely filing. IAF, Tab 2 at 2-3. The appellant responded that this appeal was timely filed within 30 days of his "receipt" of the agency decision, as authorized by the Board's regulation at 5 C.F.R. § 1201.22(b), because he had received the decision from the agency for the first time on July 7, 2009. IAF, Tab 4 at 1-2. The agency disputed the appellant's claim that he had not received notice of his removal prior to July 7, 2009. The agency argued, among other things, that the appellant had previously been provided with a copy of the removal decision as part of the agency's record filed in the restoration appeal, and that his removal for cause was one of the bases for the administrative judge's decision dismissing that appeal for lack of jurisdiction. IAF, Tab 6 at 2, Tab 3, Subtab 4c at 4. The appellant responded that he did not receive a complete copy of the removal decision in the restoration appeal as alleged by the agency, and that he had filed an objection and affidavit to that effect in the record of the restoration appeal. IAF, Tab 5 at 3-4, Exs. C, D. The documentation he submitted with his response also indicated that he had previously attempted to file a Board appeal on August 20, 2007, and that the regional office returned his appeal without docketing it because he had failed to provide a copy of the agency's decision or a copy of any corresponding SF-50. *Id.*, Ex. C at 2, 4-5.

¶6 Without holding a hearing, the administrative judge dismissed this removal appeal as untimely filed with no good cause shown. IAF, Tab 7, Initial Decision (ID). The administrative judge found that the appellant's alleged failure to receive the removal decision mailed by the agency on May 25, 2007, would have been due to the appellant's own failure to inform the agency that he had changed his address. ID at 4-5. The administrative judge further found that, in any event, the appellant learned of the agency's removal decision during the processing of his subsequent restoration appeal and that the appellant had not demonstrated good cause for waiting nearly a year after the initial decision was issued in the restoration appeal to file this appeal. ID at 5-7.

¶7 The appellant has filed a petition for review and the agency has filed a response in opposition. Petition for Review File (PFR File), Tabs 1, 3.[2]

ANALYSIS

¶8 In the decision under review, the administrative judge noted, but did not attach particular significance to, the appellant's representation that he had initially attempted to appeal his removal on August 20, 2007. ID at 6. The appellant submitted a document below in which he stated:

> By letter dated August 24, 2007[,] the Board advised the appellant that they were returning his appeal filed on August 20, 2007[,] because the appeal did not meet the Board's filing requirement[s]. Specifically[,] the Board requested that the appellant provide a copy of the agency'[s] decision letter or the SF-50 from the agency. The appellant averred to the Board at that time that he had not received a decision letter from the agency or a copy of any SF-50.

IAF, Tab 5, Ex. C at 4.

¶9 Under the circumstances, we find that this case should be analyzed in accordance with the Board's decision in *Toombs v. Department of the Army*, 69 M.S.P.R. 78 (1995). In *Toombs*, the appellant filed a timely appeal that the regional office rejected as deficient under the Board's regulations. 69 M.S.P.R. at 80-81. The regional office set a deadline for the appellant to refile a corrected appeal, but the appellant was one day late in refiling her appeal. *Id.* at 80. The administrative judge dismissed the refiled appeal as untimely filed with no good

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[2] After the close of the record on review, the appellant filed a pleading entitled "MOTION FOR INTERVENTION," asserting that unless he intervenes, his interest may not be properly represented. PFR File, Tab 6. We deny the motion. The appellant is already a party to these proceedings. To the extent that the appellant's motion contains arguments in support of remanding this appeal for further adjudication on the timeliness issue, we find that the appellant has failed to establish that his arguments are based on evidence that was not readily available prior to the close of the record on review. PFR File, Tab 2; *see Pimentel v. Department of the Treasury*, 107 M.S.P.R. 67, ¶ 3 n.* (2007), *aff'd*, 287 F. App'x 850 (Fed. Cir. 2008); *White v. Social Security Administration*, 76 M.S.P.R. 447, 459 n.8 (1997), *aff'd*, 152 F.3d 948 (Fed. Cir. 1998) (Table); 5 C.F.R. § 1201.114(i).

cause shown for the delay. *Id.* The Board reversed the initial decision, however, finding that the administrative judge erred by deciding the matter on timeliness grounds because the appellant had initially filed a timely appeal, even though it was technically deficient under the Board's regulations. *Id.* at 80-81. The Board explained that the administrative judge had effectively imposed the most severe sanction available, dismissal for failure to prosecute, for a one-day delay in responding to the order to refile a corrected appeal. *Id.* at 81. The Board found that the administrative judge improperly dismissed that case based upon a single instance of failing to comply with an order, and remanded for adjudication on the merits. *Id.* at 81-82.

¶10 Following *Toombs*, the Board has held that the date an appellant files his original appeal is considered the date of filing, even if the appeal is deficient. *Colello v. Department of the Army*, 93 M.S.P.R. 663, ¶ 8 (2003); *see Marcoullier v. Department of the Air Force*, 70 M.S.P.R. 412, 414 (1996). When an appellant has filed a timely deficient appeal and belatedly corrected the deficiency, the Board has found it appropriate to consider whether the appellant's delay in correcting the deficiency demonstrated bad faith or the intent to abandon the appeal that could support a dismissal as a sanction for failure to prosecute. *See Colello*, 93 M.S.P.R. 663, ¶ 9; *Marcoullier*, 70 M.S.P.R. at 414; *Toombs*, 69 M.S.P.R. at 81.

¶11 Because the record has not been fully developed regarding the appellant's alleged filing of an appeal on August 20, 2007, we remand for further adjudication of the timeliness issue consistent with this precedent. On remand, the administrative judge should inform the appellant of his burden to show that his alleged August 20, 2007 appeal was either timely filed or that there was good cause for his delayed filing and give both parties the opportunity to submit additional evidence and argument regarding the alleged filing on August 20, 2007. *See 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). If the appellant establishes that a

genuine dispute of material fact exists regarding any timeliness issues, he is entitled to a hearing on those issues, if he requests one. *See Hamilton v. U.S. Postal Service*, 79 M.S.P.R. 354, 357 (1998). After developing the record on these issues, the administrative judge should make a new timeliness determination giving proper consideration to the appellant's alleged filing on or about August 20, 2007. *See Colello*, 93 M.S.P.R. 663, ¶¶ 8-9; *Marcoullier*, 70 M.S.P.R. at 414; *Toombs*, 69 M.S.P.R. at 81-82. If the appeal was timely filed, the administrative judge should determine whether the appeal should be dismissed as a sanction for failure to prosecute based on evidence of bad faith or the intent to abandon a challenge to his removal. *See, e.g.*, *Colello*, 93 M.S.P.R. 663, ¶ 9.[3]

¶12 Apart from *Toombs* and its progeny, the initial decision is inconsistent with other precedent. The Board's regulations require that an appellant generally must file his appeal no later than 30 days after the effective date of the action being appealed, or 30 days after the date he received the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The administrative judge found that the appellant's alleged delay in receiving a copy of the removal decision did not excuse the appellant's failure to file a timely appeal of his removal because the agency had sent the decision to the appellant's last known address and the appellant had failed to notify the agency of any change in his mailing address. ID at 5. In support of that finding, the administrative judge relied on the Board's decisions in *Schorr v. Department of the Navy*, 79 M.S.P.R. 594, ¶ 8 (1998); *Cunningham v. Department of Transportation*, 35 M.S.P.R. 674, 677 (1987); and

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[3] In dismissing this appeal as untimely, the administrative judge referenced the Board's decision to dismiss as untimely the appellant's petition for review of the initial decision in the restoration appeal and to deny the appellant's request to reopen that appeal. ID at 5-6. The Board did not determine in the restoration appeal, however, whether the appellant had timely filed a removal appeal in August 2007 or could otherwise properly pursue such an appeal.

Mathews v. U.S. Postal Service, 34 M.S.P.R. 645, 646 (1987). ID at 5. However, in *Saddler v. Department of the Army*, 68 F.3d 1357, 1359 (Fed. Cir. 1995), the court found that the appellant's negligent failure to inform his agency of a change in address could not be a basis for deeming him to have constructively received the agency's decision at an earlier date for purposes of the time limit for filing an appeal of that decision under the Board's regulations. The court stated that the Board could not dismiss an appeal as untimely "when it has been filed in compliance with the literal requirements of the regulation" and found that the Board's regulation "contains no requirement other than that tied to the employee's receipt of the agency decision." 68 F.3d at 1359. The court emphasized that "[n]egligence is not at issue, there being no due diligence obligation in the regulation," but suggested that the result might be different if the appellant had intentionally avoided receiving the decision. *Id.*; *accord Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 647 & n.9 (Fed. Cir. 1996) (given the language of the Board's regulation, it was immaterial whether the appellant negligently delayed in picking up her certified mail). Although *Saddler* and *Hamilton* concerned the Board's regulation at 5 C.F.R. § 1201.154, regarding the time limit for filing an appeal raising a discrimination claim, and this case may be governed by the Board's regulation at 5 C.F.R. § 1201.22(b), the relevant language in these two regulations has been, at all times relevant to this appeal, essentially identical with regard to computing the time limit for filing from the date of receipt of the agency's decision. *See Horton v. Department of the Navy*, 105 M.S.P.R. 332, ¶ 9 (2007).

¶13 On remand, the administrative judge must analyze the timeliness issue consistent with the literal requirements of the Board's regulations and the court's decisions in *Saddler* and *Hamilton*. *See Horton*, 105 M.S.P.R. 332, ¶¶ 10-12; *Cody v. Department of the Navy*, 104 M.S.P.R. 161, ¶ 13 (2006). The precedent cited in the initial decision is inapplicable. *Cunningham* and *Mathews* were issued in 1987 and thus did not concern the subsequent amendment of the Board's

regulation at 5 C.F.R. § 1201.22(b) in 1997 to add that an appeal would be timely if filed within 30 days of receipt of the agency's decision.[4] *See* 62 Fed. Reg. 59991, 59991-92 (Nov. 6, 1997); *cf., e.g.*, 5 C.F.R. § 1201.22(b) (1987) (prior version of the Board's regulation providing that the time period for filing an appeal commenced with the effective date of the action being appealed, without any mention of the date the appellant received the agency's decision). The matter at issue in *Schorr* was an alleged involuntary resignation. 79 M.S.P.R. 594, ¶¶ 2, 6-8. In such a circumstance, the agency does not issue a "decision" on the appealable matter, and thus, the language in the Board's revised timeliness regulation, permitting a timely appeal within 30 days after the date of receipt of the "agency's decision," does not apply. *See* 5 C.F.R. § 1201.22(b) (as amended after Nov. 6, 1997). Moreover, Mr. Schorr resigned in June 1997, several months before the Board amended 5 C.F.R. § 1201.22 in November 1997. 79 M.S.P.R. 594, ¶ 2; *see* 62 Fed. Reg. at 59991. Nevertheless, we are aware of at least one instance in which the Board has relied on the discussion in *Schorr* in addressing the timeliness of an appeal from a matter in which an agency issued a decision after the 1997 amendments to 5 C.F.R. § 1201.22(b). *See Leslie v. U.S. Postal Service*, 83 M.S.P.R. 361, ¶¶ 2, 8, 11 (1999). In that matter, however, it appears that neither party raised an issue regarding the court's decisions in *Saddler* or *Hamilton*, and the Board's decision did not address those cases or the 1997 amendment to the language in 5 C.F.R. § 1201.22(b). *Id.*

¶14 The Board has previously followed the court's decisions in *Saddler* and *Hamilton* without expressly overruling its prior precedent to the extent that it was inconsistent with these decisions. *See Williams v. Department of Agriculture*, 106 M.S.P.R. 677, ¶¶ 15-17 (2007); *Horton*, 105 M.S.P.R. 332, ¶¶ 10-12; *Cody*,

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[4] Indeed, the particular portion of *Cunningham* cited in the initial decision addressed the appellant's explanation for an untimely response to an administrative judge's order, not the deadline for filing an initial appeal under 5 C.F.R. § 1201.22(b). ID at 5; *see* 35 M.S.P.R. at 677.

104 M.S.P.R. 161, ¶ 13. Given the confusion that has arisen in this case, we hereby overrule *Leslie* and any other Board precedent to the extent that it is inconsistent with *Saddler* and *Hamilton*.

ORDER

¶15 Accordingly, we VACATE the initial decision and REMAND this case to the Western 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.