

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

2010 MSPB 102

Docket No. AT-0752-09-0846-I-1

Gloria A. Edge,

Appellant,

v.

United States Postal Service,

Agency.

June 4, 2010

Emily Martin, Memphis, Tennessee, for the appellant.

Cynthia R. Eggleston, Esquire, Memphis, Tennessee, 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 (PFR) of an initial decision (ID) that dismissed her appeal as untimely filed. For the reasons set forth below, we DENY the petition for failure to meet the review criteria under [5 C.F.R. § 1201.115](#)(d), REOPEN the appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a preference-eligible City Letter Carrier who sustained an on-the-job injury that prevented her from returning to full-duty work. *See* Initial Appeal File (IAF), Tab 1 at 5, Tab 8, subtab 4F. On September 26, 2008, the agency offered the appellant a modified assignment, but the appellant rejected it because the agency changed the day of her scheduled day off. IAF, Tab 8, subtab 4G. The agency sent the appellant home that day and placed her on leave without pay status. *Id.*, subtab 1 at 1, subtab 4D at 2. On October 16, 2008, the appellant accepted a new modified assignment and returned to duty on October 17, 2008. *Id.*, subtab 4D at 2, subtab 4E at 1, subtab 4F at 1.

¶3 More than 9 months after returning to work, the appellant filed a Board appeal, alleging that the agency prevented her from returning to work from September 27 through October 16, 2008. IAF, Tab 1 at 3, 5. She asserted that although her physician authorized her to return to modified-duty work with new restrictions, the agency failed to process the paperwork and make a new offer of modified assignment until October 16, 2008. *Id.* She requested a hearing. *Id.* at 4.

¶4 The administrative judge ordered the appellant to prove that she timely filed her appeal or that good cause existed for the filing delay to warrant waiver of the filing deadline. IAF, Tab 3. The appellant responded. IAF, Tab 4. The agency moved to dismiss the appeal as untimely filed, alleging that it was not obligated to notify the appellant of her Board appeal rights because her absence was voluntary. IAF, Tab 8 at 2-7. The administrative judge thereafter ordered the appellant to prove that she exercised due diligence in discovering and pursuing her appeal rights and to address the agency's contentions regarding whether she timely filed her appeal. IAF, Tab 9. The appellant filed a response. IAF, Tab 10.

¶5 Based upon the written record, the administrative judge issued an initial decision dismissing the appeal as untimely filed. ID at 1, 4. He found that: (1)

the appellant untimely filed her appeal, ID at 1; (2) the appellant failed to counter the agency's contention that it was not required to provide the appellant with notice of Board appeal rights because she voluntarily absented herself from the workplace and acknowledged her refusal of the modified assignment, ID at 2-3; and (3) the appellant failed to prove that she exercised due diligence in discovering and pursuing her appeal rights, and therefore she failed to establish good cause for the filing delay to warrant waiver of the filing deadline, ID at 3-4. The appellant filed a PFR of this decision. PFR File, Tab 1. The agency has responded in opposition. PFR File, Tab 4.

ANALYSIS

We deny the petition for review for failure to meet the review criteria.

¶6 The appellant's petition for review does not provide a basis for Board review because she has not made any argument establishing error by the administrative judge or presented any new and material evidence affecting the outcome of this case.¹ See [5 C.F.R. § 1201.115\(d\)](#). We therefore DENY the appellant's petition for review. However, we reopen the appeal on the Board's own motion to find that the administrative judge erred by dismissing the appeal on timeliness grounds without considering whether the appeal is within the Board's jurisdiction.

¹ On review, the appellant submits the Board's automatic electronic appeal confirmation of her successful submission of her August 3, 2009 appeal, and letters dated between October 8 and November 18, 2008, documenting Congressman Steve Cohen's requests to the agency's Consumer Affairs and Claims division on her behalf, concerning her reinstatement and compensation. PFR File, Tab 1 at 5-16. All of these documents pre-date the November 18, 2008 initial decision, and the appellant has not shown that these documents were unavailable prior to the close of the record below. See *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). As none of these documents meet the review criteria under [5 C.F.R. § 1201.115\(d\)\(1\)](#), the Board need not consider them on review.

The administrative judge erred in dismissing the appeal as untimely filed.

¶7 Although the existence of Board jurisdiction is a threshold issue, in an appropriate case, an administrative judge may dismiss an appeal as untimely filed if the record on timeliness is sufficiently developed and shows no good cause for the untimely filing. *Hanna v. U.S. Postal Service*, [101 M.S.P.R. 461](#), ¶¶ 4, 6 (2006) (citing *Greek v. U.S. Postal Service*, [78 M.S.P.R. 470](#), 473 (1998) and *Popham v. U.S. Postal Service*, [50 M.S.P.R. 193](#), 197 (1991)). Such an approach is not appropriate, however, if the jurisdictional and timeliness issues are “inextricably intertwined,” that is, if resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. *Hanna*, [101 M.S.P.R. 461](#), ¶ 6 (citing *Popham*, 50 M.S.P.R. at 197-98 & n.5).

¶8 Here, although the appellant initially characterized the contested agency action as a furlough,² we construe her allegation that the agency prevented her from working between September 27 and October 16, 2008, as a constructive suspension claim. See PFR File, Tab 1 at 3; IAF, Tab 1 at 3, 5, Tab 10 at 3. A constructive suspension, which is appealable under [5 U.S.C. §§ 7512\(d\)](#) and [7513\(d\)](#), occurs when an agency bars an employee from duty for more than 14 days. See *Johnson v. U.S. Postal Service*, [110 M.S.P.R. 679](#), ¶ 8 (2009). The dispositive question in determining whether a suspension took place is who initiated the absence; if the employee initiated the leave period, the absence is not a constructive suspension. *Tardio v. Department of Justice*, [112 M.S.P.R. 371](#), ¶ 23 (2009). Conversely, if the absence is involuntary, i.e., at the direction of the agency, then the employee has been constructively suspended. *Id.* As a preference-eligible Postal Service employee, the appellant may have the right to

² The regulation at [5 C.F.R. § 752.402\(c\)](#) defines “furlough” as “the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.”

appeal her alleged constructive suspension action to the Board.³ 5 U.S.C. § 7511(a)(1)(B); 39 U.S.C. § 1005(a)(4)(A).

¶9 The issues of timeliness and jurisdiction are generally considered to be inextricably intertwined in a constructive suspension appeal because a failure to inform an employee of Board appeal rights may excuse an untimely filed appeal, and whether the agency was obligated to inform the employee of such appeal rights depends on whether the employee was affected by an appealable action. *Hanna*, [101 M.S.P.R. 461](#), ¶ 6 (citing *Parker v. U.S. Postal Service*, [59 M.S.P.R. 603](#), 608-10 (1993); *Miller v. U.S. Postal Service*, [78 M.S.P.R. 417](#), 420 (1998); and *Davis v. Department of the Navy*, [74 M.S.P.R. 184](#), 188-89 (1997)). As set forth above, the appellant alleges that the agency placed her on leave without pay status and prevented her from returning to duty until it made a new offer of modified assignment on October 16, 2008, and that she did not know that she could file a Board appeal until August 2009. PFR File, Tab 1 at 3; IAF, Tab 4 at 3. Because the issues of timeliness and jurisdiction are inextricably intertwined, the administrative judge erred in dismissing this constructive suspension appeal as untimely filed.

¶10 We note that, in dismissing the appeal as untimely filed, the administrative judge cited *Jones v. U.S. Postal Service*, [65 M.S.P.R. 306](#), 310-13 (1994), for the proposition that, when an agency is not required to provide a notice of appeal rights and the employee later files an appeal beyond the deadline, she must show that she exercised due diligence in attempting to discover and pursue her rights. ID at 3. Although this proposition of law is unobjectionable in itself,⁴ the

³ A preference-eligible Postal Service employee has Board appeal rights under 5 U.S.C. Chapter 75, subchapter II, only if she has completed 1 year of current continuous service in the same or similar positions. [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#); [39 U.S.C. § 1005\(a\)\(4\)\(A\)](#); *Pagan v. U.S. Postal Service*, [111 M.S.P.R. 212](#), ¶ 6 (2009).

⁴ We note that *Jones* was an unusual case in that the Board determined that the Postal Service could reasonably have believed that it did not need to follow the Office of Personnel Management's reduction in force procedures (RIF) during its national

administrative judge concluded that the agency was not required to notify the appellant of her Board appeal rights on the grounds that the appellant had not responded to his direction that, if she “believed that the agency was required to notify her of appeal rights, she should so state and provide the factual and legal basis for her contention.” *Id.* However, the appellant was not in a position to articulate a legal basis for a contention that the agency was required to provide a notice of appeal rights where the administrative judge had not apprised her of the requirements to establish a nonfrivolous allegation of a constructive suspension or informed her that the issues of timeliness and jurisdiction are generally considered to be “inextricably intertwined” in such cases. Even without such notice from the administrative judge, the appellant raised a question as to whether her absence from the workplace was voluntary:

I did refuse on paper only the limited duty assignment but only four days after I was sent home, I returned to work with medical documentation and submitted this to my union steward as well as the station manager with my new medical information and she . . . replied that it had to go back to district. The area manager approved for me to return to work immediately after I told him that they had been sitting on my paperwork for two entire weeks.

IAF, Tab 10 at 3.

¶11 As there is a question concerning the voluntariness of the appellant’s absence from the workplace, it necessarily follows that a question exists regarding whether the agency was required to provide a notice of appeal rights. If it were, then the appellant’s only duty vis-à-vis the Board’s filing deadline was

restructuring, “based on its quasi-independent status and the fact that a large portion of its workforce was not covered by civil service rules.” *Wylie v. Department of Agriculture*, [99 M.S.P.R. 71](#), ¶ 10 (2005). It was for this reason that the Board concluded that the Postal Service was not required to inform retirement-eligible employees about their RIF rights during the 1992-93 restructuring. *Id.* Unlike the situation in *Jones* with respect to RIF rights, the rules governing constructive suspensions have long been established. *See, e.g., Justice v. Department of the Navy*, [89 M.S.P.R. 379](#), ¶ 5 (2001); *Williams v. U.S. Postal Service*, [84 M.S.P.R. 374](#), ¶ 7 (1999); *Miller v. U.S. Postal Service*, [78 M.S.P.R. 417](#), 419 (1998).

to act promptly once she became aware of the basis of her claim. *Gordy v. Merit Systems Protection Board*, [736 F.2d 1505](#), 1508 (Fed. Cir. 1984). Here, the appellant stated that “I filed this as soon as I was aware that I could [do so].” IAF, Tab 4 at 3.

¶12 In sum, we find that, because resolution of the timeliness issue depends on whether the appellant was subjected to an appealable constructive suspension and because the administrative judge did not make jurisdictional findings, it was improper for the administrative judge to dismiss this appeal as untimely filed. *See Higgins v. U.S. Postal Service*, [86 M.S.P.R. 447](#), ¶ 10 (2000).

¶13 We therefore VACATE the initial decision, and REMAND this appeal to the Atlanta Regional Office to determine whether the Board has jurisdiction over this alleged constructive suspension appeal, and, if so, whether the filing deadline should be waived for good cause. On remand, the administrative judge shall give the appellant notice of the jurisdictional requirements for nonfrivolously alleging a constructive suspension claim, and allow the parties an opportunity to submit evidence and argument thereon. The administrative judge shall hold a hearing if appropriate.

ORDER

¶14 Based on the foregoing, we VACATE the initial decision and REMAND the appeal to the Atlanta Regional Office consistent with this Opinion and Order.

FOR THE BOARD:

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