

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

**2010 MSPB 223**

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Docket Nos. DE-315H-09-0407-I-1  
DE-1221-10-0146-W-1

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**James H. Tarr,**

**Appellant,**

**v.**

**Department of Veterans Affairs,**

**Agency.**

November 12, 2010

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James H. Tarr, Grand Junction, Colorado, pro se.

Thomas R. Kennedy, Esquire, Denver, Colorado, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mary M. Rose, Member

**OPINION AND ORDER**

¶1 On March 5, 2010, the appellant submitted a request to reopen his “case.” The Clerk of the Board processed the request as a petition for review of the separate initial decisions dismissing the appellant’s termination appeal (MSPB Docket No. DE-315H-09-0407-I-1) and his individual right of action (IRA) appeal (MSPB Docket No. DE-1221-10-0146-W-1) as withdrawn. We JOIN these appeals under [5 C.F.R. § 1201.36\(b\)](#) for purposes of adjudicating the appellant’s petition. We GRANT the petition for review in the termination appeal, VACATE the initial decision that dismissed that appeal, and REMAND

the termination appeal for further proceedings consistent with this Opinion and Order. We DENY the petition for review in the IRA appeal.

### BACKGROUND

¶2 On June 18, 2009, the agency informed the appellant that he was being terminated during his probationary period, effective the same day, for inappropriate behavior. *Tarr v. Department of Veterans Affairs*, MSPB Docket No. DE-315H-09-0407-I-1 (Termination Appeal), Initial Appeal File (IAF), Tab 4 at 2. The agency informed the appellant of his right to appeal his termination to the Board if he believed the termination was based on discrimination because of marital status or partisan political reasons. *Id.*

¶3 On June 28, 2009, the appellant filed a Board appeal challenging his termination during his probationary period. Termination Appeal, IAF, Tab 1. He requested a hearing. *Id.* at 2. He indicated that he was terminated based on conditions arising before appointment and that the action was procedurally improper. *Id.* at 3. Specifically, he alleged that, 18 months prior to his appointment, he had turned in the husband of an agency official for wearing awards and decorations on his Grand Valley Combined Honor Guard uniform that were not earned and that his supervisors treated him as a troublemaker because of that action. *Id.* at 7. He also alleged that the agency discriminated against him on the basis of disability (post-traumatic stress disorder). *Id.* at 8. Finally, he alleged that the agency committed several prohibited personnel practices. *Id.* at 9.

¶4 On July 10, 2009, the administrative judge issued an initial decision dismissing the appeal as withdrawn. Termination Appeal, IAF, Tab 6. She indicated that the appellant had stated during a telephonic status conference that he was not alleging that his termination was based on partisan political reasons or marital status and that he therefore wanted to withdraw his appeal. *Id.* at 2.

¶5 On December 21, 2009, the appellant filed an IRA appeal. *Tarr v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-10-0146-W-1 (IRA Appeal), IAF, Tab 1. On January 26, 2010, the administrative judge issued an initial decision dismissing the IRA appeal as withdrawn. IRA Appeal, IAF, Tab 11. She indicated that the appellant had stated during a telephonic status conference that the administrative judge had misunderstood his appeal and that he did not intend to file an IRA appeal pursuant to the Whistleblower Protection Act. *Id.* at 1-2. The administrative judge further indicated that the appellant had stated that he was attempting to challenge his termination during his probationary period under [5 C.F.R. §§ 315.805](#) and 315.806. *Id.* at 2 n.\*. The administrative judge stated that she advised the appellant that she would docket a second appeal to address those claims. *Id.*

¶6 On February 23, 2010, the administrative judge sent the appellant a letter memorializing a telephone conversation that took place the same day. Termination Appeal, IAF, Tab 7.<sup>1</sup> According to the letter, the appellant indicated that he wanted to appeal his termination. *Id.* at 1. The administrative judge informed the appellant that he had previously filed and withdrawn such an appeal and that she did not have the authority to reopen that appeal. *Id.* She instructed the appellant to file a petition for review in order to request that the Board reopen the appeal. *Id.* The administrative judge also noted that the appellant had withdrawn his IRA appeal based on her erroneous statement that she would docket a new appeal challenging the termination. *Id.* She informed the appellant that she could not vacate her initial decision and reopen the IRA appeal and she instructed him to file a petition for review if he wanted the Board to reopen that appeal. *Id.* at 2.

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<sup>1</sup> Several identical documents appear in the case file for both of the appellant's appeals. For all such documents, the citations herein are to the Termination Appeal case file.

¶7 On March 8, 2010, the appellant submitted a request to reopen his “case.” Termination Appeal, Petition for Review (PFR) File, Tab 1. He argued that he was not given advance notice of his proposed termination as required under [5 C.F.R. § 315.805](#)(a). *Id.* at 1. He stated that the administrative judge informed him that his termination appeal was not within the Board’s jurisdiction and that he should take his complaint to the Office of Special Counsel (OSC). *Id.* at 2. The appellant indicated that OSC instructed him to file a Board appeal and that he therefore filed a second Board appeal. *Id.* He stated that, when the administrative judge asked him if his second appeal was a whistleblower reprisal appeal, he told her it was not, and she advised him to have the second appeal dismissed. *Id.* The appellant stated that he later received a letter from the administrative judge stating that she could not reopen the termination appeal. *Id.* at 3. The appellant requested that the Board reopen the appeal, citing 5 C.F.R. § 315.806(c). *Id.* at 4.

¶8 The Clerk of the Board informed the appellant that his correspondence filed on March 8 would be considered as a petition for review in both of his appeals. Termination Appeal, PFR File, Tab 2; IRA Appeal, PFR File, Tab 2. The Clerk also informed the appellant that his petitions for review appeared to be untimely filed. Termination Appeal, PFR File, Tab 2 at 1; IRA Appeal, PFR File, Tab 2 at 1. The Clerk directed the appellant to file a motion to accept the filing as timely and/or to waive the time limit for good cause. Termination Appeal, PFR File, Tab 2 at 1; IRA Appeal, PFR File, Tab 2 at 1. The appellant filed a timely motion to waive the time limit in both appeals. Termination Appeal, PFR File, Tab 3; IRA Appeal, PFR File, Tab 3. The agency filed timely responses in opposition to the appellant’s motions and petitions for review. Termination Appeal, PFR File, Tab 4; IRA Appeal, PFR File, Tab 4.

### ANALYSIS

¶9 As a preliminary matter, we note that joinder of two or more appeals filed by the same appellant is appropriate where doing so would expedite processing of the cases and not adversely affect the interests of the parties. *Boechler v. Department of the Interior*, [109 M.S.P.R. 542](#), ¶ 14 (2008), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009); [5 C.F.R. § 1201.36\(a\)\(2\)](#), (b). We find that these appeals meet the regulatory criteria, and therefore we join them here. *See Roesel v. Peace Corps*, [111 M.S.P.R. 366](#), ¶ 6 (2009).

¶10 A probationary employee in the competitive service who has not completed 1 year of current continuous service has no statutory right of appeal to the Board. *See* [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#); *McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1341 (Fed. Cir. 2002). Such an employee has a regulatory right of appeal to the Board, however, if he makes a nonfrivolous allegation that he was terminated due to discrimination based on marital status, or for partisan political reasons, or because of conditions arising before appointment to the position in question. [5 C.F.R. §§ 315.805](#)-.806. In the latter instance, the only ground for appeal is that the agency did not follow the procedural requirements of 5 C.F.R. § 315.805. *Coleman v. Veterans Administration*, [3 M.S.P.R. 274](#), 276 (1980); 5 C.F.R. § 315.806(c).

¶11 Here, the appellant indicated in his initial appeal that he was terminated based on conditions arising before appointment and that the action was procedurally improper. Termination Appeal, IAF, Tab 1 at 3. In an acknowledgment order issued on June 29, 2009, the administrative judge initially assigned to the appeal noted that the Board could have jurisdiction over the appellant's termination appeal if the termination was based on matters occurring before his appointment, and the appellant alleged that the agency violated the procedures set forth in [5 C.F.R. § 315.805](#). Termination Appeal, IAF, Tab 2 at 3. The administrative judge ordered the appellant to file evidence and argument on the jurisdictional issues by July 14, 2009. *Id.* Before either party responded to

that order, the appeal was reassigned to a new administrative judge who conducted a status conference with the parties on July 10, 2009. Termination Appeal, IAF, Tab 5. After that status conference, the new administrative judge issued an initial decision dismissing that appeal as withdrawn. *Id.*, Tab 6. The administrative judge stated that the termination was for post-appointment reasons and that the Board would therefore only have jurisdiction over the appeal if the appellant alleged that the termination was based on partisan political reasons or marital status discrimination. *Id.* at 1. The appellant withdrew the termination appeal based on that understanding of the Board's jurisdiction. *Id.* at 2.

¶12 An appellant's withdrawal of an appeal is an act of finality and, absent unusual circumstances, the Board will not reinstate the appeal once it has been withdrawn. *See Scarboro v. Department of the Navy*, [55 M.S.P.R. 494](#), 496 (1992); *Wilson v. U.S. Postal Service*, [45 M.S.P.R. 499](#), 502 (1990). The Board may relieve the appellant of the consequences of his or her decision to withdraw the appeal, however, where the decision was based on incorrect or misleading information. *See Scarboro*, 55 M.S.P.R. at 497. For the reasons set forth below, we find that the appellant, who has been unrepresented throughout the processing of both of his Board appeals, withdrew his termination appeal based on incorrect information and that he should therefore be relieved of the consequences of his decision to withdraw that appeal.

¶13 The appellant bears the burden of proving Board jurisdiction by a preponderance of the evidence. [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#). Where an appellant makes a nonfrivolous allegation that the Board has jurisdiction, he is entitled to a hearing on the jurisdictional question. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994). Nonfrivolous allegations are allegations of fact that, if proven, could establish a prima facie case that the Board has jurisdiction over the matter in issue. *Id.*

¶14 We find that the appellant's allegations in his initial appeal constitute a nonfrivolous allegation that he was terminated because of conditions arising

before his appointment. *See Pierce v. Government Printing Office*, [70 F.3d 106](#), 108-09 (Fed. Cir. 1995) (although the agency indicated that it was terminating the appellant for post-appointment reasons, the appellant's allegation that the termination was based on a pre-appointment medical condition was sufficient to establish Board jurisdiction under [5 C.F.R. § 315.806\(c\)](#)). Although the agency's stated reason for terminating the appellant was his post-appointment behavior, Termination Appeal, IAF, Tab 4 at 2, the agency's claim that the termination was for post-appointment reasons is not dispositive of the jurisdictional issue. *Tolbert v. Small Business Administration*, [104 M.S.P.R. 418](#), ¶ 8, *aff'd*, 245 F. App'x 964 (Fed. Cir. 2007).

¶15 Because the appellant withdrew his termination appeal under the mistaken belief that the Board would only have jurisdiction if he alleged that the termination was based on partisan political reasons or marital status discrimination, we find that the withdrawal was based on misinformation. We therefore VACATE the initial decision that dismissed the termination appeal as withdrawn.<sup>2</sup> *See Brooks v. Department of the Army*, [67 M.S.P.R. 551](#), 553-54 (1995) (reopening appeal where the appellant's express reason for withdrawing

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<sup>2</sup> The finality date of the initial decision dismissing the termination appeal as withdrawn was August 14, 2009. Termination Appeal, IAF, Tab 6 at 2. The appellant's petition for review filed on March 8, 2010, was therefore untimely by more than 6 months. However, the appellant was not aware that he had been misinformed about the extent of the Board's jurisdiction to review claims concerning a probationary termination for pre-employment reasons until after the January 25, 2010 status conference in his IRA appeal. Moreover, it was not until February 23, 2010, that the administrative judge informed the appellant that he would need to request reopening with the Board. The appellant filed his request only 13 days later. To establish good cause for the untimely filing of a petition for review, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). We find that the appellant exercised such due diligence upon learning of the need to request reopening with the Board. The agency has not alleged any prejudice to its substantive rights arising out of the filing delay. Accordingly, we waive the time limit for filing the petition for review in the termination appeal. *See* [5 C.F.R. § 1201.114\(f\)](#).

her appeal was her mistaken belief that she could pursue her mixed-case discrimination claim before the Equal Employment Opportunity Commission, independently of the Board, and the administrative judge failed to inform the appellant of the legal consequences of withdrawal).

¶16 The appellant withdrew his IRA appeal with the understanding that the administrative judge would docket a second appeal in which he could challenge his termination during his probationary period under [5 C.F.R. §§ 315.805](#) and 315.806. IRA Appeal, IAF, Tab 11 at 2 n.\*. Because we are reopening the termination appeal, the appellant will have the opportunity to challenge his termination on that basis. We also note that the appellant has not indicated that he wants to pursue the IRA appeal. Therefore, we deny his petition for review of the January 26, 2010 initial decision dismissing his IRA appeal as withdrawn<sup>3</sup> and we will not exercise our discretion to reopen that appeal. The initial decision dismissing the IRA appeal as withdrawn shall remain final.

#### ORDER

¶17 Accordingly, we VACATE the initial decision that dismissed MSPB Docket No. DE-315H-09-0407-I-1 and REMAND that appeal for an adjudication of the appellant's claim that his termination was based in whole or in part on pre-appointment reasons without proper procedures.

¶18 This is the final decision of the Merit Systems Protection Board in MSPB Docket No. DE-1221-10-0146-W-1 only. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

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<sup>3</sup> In reaching this decision, we make no findings regarding the timeliness of the petition for review in the appellant's IRA appeal.



NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS  
IN MSPB DOCKET NO. DE-1221-10-0146-W-1

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.ca9c.uscourts.gov](http://www.ca9c.uscourts.gov). Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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