

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

2011 MSPB 56

Docket Nos. DA-0752-10-0200-I-1
DA-0752-09-0604-R-1

Barbara R. King,

Appellant,

v.

Department of the Air Force,

Agency.

May 26, 2011

Linda Wilson, San Antonio, Texas, for the appellant.

Heather A. Masten, Esquire, Lackland AFB, Texas, 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 an individual right of action (IRA) appeal (MSPB Docket No. DA-0752-10-0200-I-1) as untimely filed. For the reasons set forth below, we VACATE the initial decision and DISMISS the IRA appeal for lack of jurisdiction. We also REOPEN the appellant's demotion appeal (MSPB Docket No. DA-0752-09-0604-R-1) under [5 C.F.R. § 1201.118](#), and REMAND the demotion appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On July 17, 2009, the appellant filed an appeal from the agency's July 13, 2009 decision to demote her effective July 19, 2009, based upon four charges of misconduct. *King v. Department of the Air Force*, MSPB Docket No. DA-0752-09-0604-I-1, Initial Appeal File (IAF-1). On September 14, 2009, the appeal was dismissed as premature because it appeared that the appellant had filed a request for corrective action with the Office of Special Counsel (OSC) before filing her appeal with the Board.¹ IAF-1, Tab 9 at 2.

¶3 On November 6, 2009, OSC issued a letter terminating its inquiry into the appellant's whistleblower allegations. *King v. Department of the Air Force*, MSPB Docket No. DA-0752-10-0200-I-1 (IAF-2), Tab 10 at 4. The appellant therefore apparently had 65 days after OSC's issuance of its termination letter, or until January 11, 2010, to file an IRA appeal with the Board. [5 U.S.C. § 1214\(a\)\(3\)\(A\)\(ii\)](#); [5 C.F.R. § 1209.5\(a\)\(1\)](#).²

¶4 On January 12, 2010 at 12:03 a.m., the appellant filed an IRA appeal via the Board's electronic filing procedures. IAF-2, Tab 1, Tab 10 at 4. The administrative judge issued an acknowledgment order and two show cause orders advising the appellant that she appeared to have filed her IRA appeal late based

¹ The appellant did not file a petition for review of this initial decision. Therefore, it was the final decision of the Board.

² The Whistleblower Protection Act provides that an IRA appeal may be filed with the Board if "no more than 60 days have elapsed since notification was provided to [the] employee, former employee, or applicant for employment that [OSC's] investigation was terminated." [5 U.S.C. § 1214\(a\)\(3\)\(A\)\(ii\)](#); *Pacilli v. Department of Veterans Affairs*, [113 M.S.P.R. 526](#), ¶ 8, *aff'd*, 404 F.App'x 466 (Fed. Cir. 2010). The Board's regulations further provide that an IRA appeal must be filed no later than 65 days after the issuance of OSC's written notification that the investigation was terminated or, if the appellant shows that OSC's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the notification. [5 C.F.R. § 1209.5\(a\)\(1\)](#); *Pacilli*, [113 M.S.P.R. 526](#), ¶ 8. The Board has consistently held that it has no authority to waive the statutory time limit for filing an IRA appeal even if the delay was minimal. *Pacilli*, [113 M.S.P.R. 526](#), ¶ 10.

on the statutory time limit in [5 U.S.C. § 1214\(a\)\(3\)](#). *Id.*, Tabs 2, 7, 11. In her orders, the administrative judge also informed the appellant that she had the burden of proof on the timeliness issue, set forth the applicable timeliness criteria, and ordered her “to show cause why her appeal should not be dismissed as untimely filed.” *Id.*, Tab 2 at 2, Tab 7 at 1-2, Tab 11 at 1-3.

¶5 In response, the appellant acknowledged that her former attorney informed her that she was required to file her appeal by January 11, 2010, but she argued that extenuating circumstances prevented her from filing a timely appeal. IAF-2, Tab 12 at 4-5. Specifically, she asserted that her sister-in-law died on January 2, 2010, she changed jobs and moved from Texas to California, she had technical difficulties using the Board’s e-Appeal system, and she had to proceed pro se after losing her representation. *Id.*

¶6 Based on the written record, the administrative judge issued an initial decision dismissing the appeal as untimely filed. IAF-2, Tab 45 at 2, 9. The administrative judge found that, “[w]hile the appellant filed the appeal less than five minutes beyond the time limit, and the circumstances she describes would normally exhibit good cause for waiving the filing deadline for an appeal filed pursuant to [5 C.F.R. § 1201.22](#), the Board has no authority to waive the statutory time limit for filing an [IRA] appeal even for good cause shown.” *Id.* at 8. The administrative judge also found “that the factual circumstances . . . do not support an equitable tolling of the statutory time limit.” *Id.* at 8-9.

¶7 The appellant has filed a petition for review, which the agency has opposed. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶8 Although the administrative judge properly noted that the Board has no authority to waive the statutory time limit for filing an IRA appeal, the record in this appeal presents a more fundamental issue, namely, whether the appellant elected to appeal her demotion with the Board before filing a complaint with the

OSC. Under the governing statutory scheme, an employee who has been subjected to an action that is appealable to the Board and alleges that she has been affected by a prohibited personnel practice (other than a claim of discrimination under § 2302(b)(1)) may elect to pursue a remedy through one, and only one, of the following remedial processes: (1) An appeal to the Board under [5 U.S.C. § 7701](#); (2) a grievance filed pursuant to the provisions of the negotiated grievance procedure; or (3) a complaint following the procedures for seeking corrective action from OSC under [5 U.S.C. §§ 1211-1222](#). See [5 U.S.C. § 7121\(g\)](#); *Feiertag v. Department of the Army*, [80 M.S.P.R. 264](#), ¶ 5 (1998). Under this statutory scheme, an employee's first timely-filed action determines the exclusive election under section 7121.

¶9 Relying upon the September 14, 2009 initial decision in MSPB Docket No. DA-0752-09-0604-I-1, the administrative judge in the instant appeal, MSPB Docket No. DA-0752-10-0200-I-1, determined that the appellant initially filed a Board appeal on July 20, 2009. IAF-2, Tab 45 at 1. She also accepted the statement in the prior initial decision that the appellant filed a complaint with OSC prior to filing an appeal with the Board. *Id.* at 2. However, the record shows that in MSPB Docket No. DA-0752-09-0604-I-1, the appellant first filed an appeal with the Board at 4:39 p.m. on July 17, 2009. IAF-1, Tab 1. While this would have been shortly prior to the effective date of her demotion on July 19, 2009, the Board's practice in such circumstances is normally to deem the appeal to have been filed at midnight of the effective date of the demotion. See *Jones v. U.S. Postal Service*, [110 M.S.P.R. 674](#), ¶ 3 n.1 (2009) (an appeal filed before the effective date of the adverse action is premature, but it becomes ripe for adjudication on the effective date of the action).

¶10 The appeal file did not contain a copy of the appellant's OSC complaint, or any other specific information establishing the date and time of the filing of the complaint. However, the record suggested that the appellant filed her OSC complaint on or about July 20, 2009, which would have been after the filing of

her Board appeal on July 19, 2009. IAF-2, Tab 5, Enclosures 1, 2. Therefore, to resolve the question of which remedy the appellant first elected, the Board issued an Order to Show Cause on March 25, 2011, directing the appellant to file evidence to establish the precise time, date, and manner in which she submitted her complaint to OSC, and providing the agency with an opportunity to respond to the appellant's submission. PFR File, Tab 4. In response to the order, the appellant submitted a copy of a completed Form OSC-11,³ which documents that she began making entries on July 19, 2009 at 1:39 a.m. and last modified it on July 20, 2009 at 9:11 a.m. *Id.*, Tab 6 at 4. Thus, it appears that the appellant electronically submitted the completed Form OSC-11 to OSC on July 20, 2009. *Id.* Moreover, the appellant further noted on the form that she had previously filed an appeal with the MSPB on July 17, 2009. *Id.* at 6.

¶11 In its reply to the appellant's submission, the agency argues that the administrative judge in MSPB Docket No. DA-0752-09-0604-I-1 and the agency relied upon statements made by the appellant's counsel that she had first filed her complaint with OSC and wished to proceed with her OSC complaint. PFR File, Tab 8 at 5. The agency thus contends that the Board should determine that the appellant made a binding election to proceed with the OSC complaint process. *Id.* at 7. Accordingly, the agency concludes that the administrative judge's dismissal of MSPB Docket No. DA-0752-10-0200-I-1 as untimely filed should be affirmed because the Board has no authority to waive the statutory time limit for filing an IRA appeal, even for good cause shown. *Id.*

³ OSC's regulation provides that, "[e]xcept for complaints limited to alleged violation(s) of the Hatch Act, OSC will not process a complaint filed in any format other than a completed Form OSC-11. If a filer does not use Form OSC-11 to submit a complaint, OSC will provide the filer with information about the form. The complaint will be considered to be filed on the date on which OSC receives a completed Form OSC-11." See [5 C.F.R. § 1800.1\(c\)\(3\)](#) (2009).

¶12 However, it is well established that an employee is deemed to have made a binding election of forum when she has timely filed either a notice of appeal under the Board's applicable appellate procedures, a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, or an allegation to OSC under [5 U.S.C. § 1214\(a\)\(1\)](#). See *Calvetti v. Department of the Air Force*, [107 M.S.P.R. 480](#), ¶ 7 (2007). Having elected to first file a direct appeal with the Board, the appellant's appeal should have been processed in accordance with adverse action procedures under 5 U.S.C. Chapter 75. In other words, we find that MSPB Docket No. DA-0752-09-0604-I-1 never should have been dismissed because the appellant made a binding election to proceed before the Board rather than pursue corrective action before OSC. Unfortunately, the administrative judge in MSPB Docket No. DA-0752-09-0604-I-1 erroneously determined that the appellant had made a binding election to proceed before OSC and dismissed the appeal to allow the appellant to pursue her claim of reprisal for whistleblowing with OSC. IAF-1, Tab 9. Under similar circumstances, the Board has found that an appellant who has exercised due diligence should be permitted to reopen a withdrawn appeal and to proceed with the adjudication of his appeal under [5 U.S.C. § 7701](#). See *Shannon v. Department of Homeland Security*, [100 M.S.P.R. 629](#), ¶ 9 (2005) (Board reopened an appeal where the appellant withdrew the appeal based upon the representations of the administrative judge that he could pursue his claim of reprisal for whistleblowing with OSC). We therefore reopen the appellant's Chapter 75 demotion appeal and remand it to the Dallas Regional Office for adjudication on the merits.

¶13 Having found that the appellant made a binding election to pursue a Board appeal under [5 U.S.C. § 7701](#) challenging her demotion, we must find that she was barred under [5 U.S.C. § 7121\(g\)](#) from also pursuing corrective action before OSC with respect to the same action. In the absence of a valid request for corrective action before OSC, we find that the Board lacks jurisdiction over the appellant's IRA appeal under 5 U.S.C. § 1221(a).

ORDER

¶14 Accordingly, we VACATE the initial decision in MSPB Docket No. DA-0752-10-0200-I-1, and we DISMISS that appeal for lack of jurisdiction. This is the final decision of the Board with respect to MSPB Docket No. DA-0752-10-0200-I-1. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

¶15 However, we REOPEN MSPB Docket No. DA-0752-09-0604-R-1, and REMAND that appeal for further adjudication consistent with this Opinion and Order.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS
with respect to MSPB Docket no. DA-0752-10-0200-I-1

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision in MSPB Docket No. DA-0752-10-0200-I-1. 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.cafc.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:

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