

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

DAVID NOBLE,

Appellant,

DOCKET NUMBER

DC-0752-12-0054-I-1

v.

UNITED STATES POSTAL SERVICE,

Agency.

DATE: February 14, 2012

David Noble, Gaithersburg, Maryland, pro se.

Stephen W. Furgeson, Esquire, Landover, Maryland, for the agency.

BEFORE

Daniel Madden Turbitt
Administrative Judge

INITIAL DECISION

David W. Noble Jr. filed an appeal, in which he alleged that the U.S. Postal Service placed him on constructive suspension for more than 14 days. Appeal File (AF), Tab 1.¹ I held a hearing at the appellant's request.²

For the reasons stated below, the appeal is dismissed as untimely filed.³

¹ Citations to the record in this appeal will be referred to as "AF, Tab _." Citations to the record in the previous removal appeal will be referred to as "Removal AF, Tab _."

² At the November 4, 2011 hearing on the removal action, several witnesses testified at length about issues related to the constructive suspension claim.

³ Because of my finding that the appeal is untimely filed, I have not addressed whether the Board lacks jurisdiction over the appeal.

ANALYSIS AND FINDINGS

Background

On April 28, 2011, the agency notified the appellant that it was proposing his removal for unsatisfactory attendance and being absent without official leave (AWOL). *See* Removal Appeal File (Removal AF), MSPB Docket. No. DC-0752-11-0880-1-1, Tab 7, Subtab 4b. More specifically, the agency charged that he was AWOL from February 24, 2011 through April 28, 2011. *See id.*, Subtabs 4a, 4c. The agency alleged that the appellant failed to report to duty after being sent a notice regarding his absences and that he refused to submit medical documentation to substantiate those absences. *See id.* On July 5, 2011, the agency issued a decision letter that sustained the charge and advised the appellant that he would be removed from his position. Removal AF, Tab 7, Subtab 4a. On August 15, 2011, the appellant filed an appeal with the Board challenging the agency's decision to remove him, effective July 22, 2011. *See* Removal AF, Tab 1. On December 14, 2011, I issued an initial decision, finding that the agency proved its charge and affirming the agency's decision to remove the appellant. *See Noble v. U.S. Postal Service*, MSPB Docket. No. DC-0752-11-0880-1-1 (Initial Decision, Dec. 14, 2011); Removal AF, Tab 45.

During the processing of the appellant's removal appeal, he requested that I modify the issues identified in my Order and Summary of Prehearing Conference, dated September 27, 2011, to include a claim that he was constructively suspended. As a result, I granted his request, in part, by docketing his constructive suspension claim as a new, separate appeal. *See* AF, Tab 1; AF, Tab 2 ("Order and Summary of Second Prehearing Conference"), pp. 1-2; *see also* Removal AF, Tabs 11, 13, 15, and 23.

The appeal was untimely filed with the Board.

The Board's regulations at 5 C.F.R. § 1201.22(b) require that an appeal be filed within 30 days of the effective date of an adverse action, or 30 days after the

date the appellant receives the agency's decision, whichever is later. Here, it is unclear exactly when the effective date of the challenged action occurred because the appellant has not always been consistent in his belief regarding when the constructive suspension period began and ended. *See* Removal AF, Tabs 1, 11, 13, 15, 16-17, 23, 28, and 41. At various points, the appellant seemed to suggest that the constructive suspension started on January 14, 2011. At other times, he appeared to argue that the constructive suspension period covered the same time he was charged as being AWOL (February 24, 2001 through April 28, 2011). On other occasions, he implied that the effective date of the constructive suspension continues "to date." I find that, because the appellant was no longer an agency employee after July 22, 2011, any possible constructive suspension period could not have occurred at any time after the effective date of his removal. *See generally, Donahue v. U.S. Postal Service*, 100 M.S.P.R. 387, ¶ 21 (2005) (an appellant who acknowledged that he was "still on the agency rolls" as an employee could not make a nonfrivolous allegation that he was constructively removed for jurisdictional purposes).

By regulation, the date of filing of an e-filed appeal is based on the e-filing submission date noted in the lower portion of the Board's appeal form. 5 C.F.R. § 1201.4. The appellant e-filed his removal appeal on August 15, 2011. Nonetheless, as I set forth in my Prehearing Conference Summary in the removal appeal, the appellant clearly stated for the first time that he believed he was constructively suspended when he filed a prehearing submission on September 23, 2011, in the original appeal. Given this, I conclude that September 23, 2011, is the date of filing. In that pleading, the appellant contended that his "absence from work should be considered a constructive suspension rather than an unauthorized absence because the Agency had made Appellant's working conditions intolerable." AF, Tab 11 at p. 1.

The appellant, both in his pleadings and verbally at the two prehearing conferences in the removal appeal, argued that he thought the constructive

suspension might have begun on January 14, 2011. If this is true, then the appellant initially had a right to file an appeal to the Board 30 days after January 29, 2011 (at which point the suspension had elapsed beyond 14 days from its inception on January 14th). Figuring 30 days from the January 29, 2011 date, the appellant's appeal would have been due on or around February 28, 2011. If, however, the effective date of the action was at the end of the AWOL period - or on April 28, 2011 - then the appeal was due on or around Tuesday, May 31, 2011.⁴ On the other hand, if I were to find that the date of the action was the effective date of the removal - or on July 22, 2011 - then the appeal should have been filed on or around Monday, August 22, 2011. I therefore find that the appeal of the alleged constructive suspension was untimely filed by either : 207 days (if based on more than 14 days after the January 14, 2011 commencement of the purported constructive suspension); 115 days (if calculated from the end of AWOL date); or 32 days (if from the effective date of the removal).

The appellant has the burden of proof on the timeliness of the appeal.

The appellant bears the burden of proof on the issue of the timeliness of his appeal by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(ii). Preponderance of the evidence is defined by regulation as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). Before the Board will waive the time limit for filing, the appellant must show good cause for failing to meet the time limit. 5 C.F.R. §§ 1201.12, 1201.22(c); *Dix v. Department of the Army*, 77 M.S.P.R. 414, 417 (1998).

⁴ The 30th day actually fell on a Saturday, and so the next business day (because of the Memorial Day holiday weekend), was on a Tuesday.

The appellant has not shown good cause for waiving the filing deadline for this appeal.

The Board has held that, to establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence and ordinary prudence under the particular circumstances of the case. 5 C.F.R. §§ 1201.12, 1201.22(c) (2000); *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The factors to be considered in determining good cause include: (1) the length of the delay; (2) whether the appellant was notified of the time limit or was otherwise aware of it; (3) circumstances beyond the appellant's control affecting his ability to comply with the time limit; (4) whether the appellant was negligent in failing to meet the time limit; (5) whether the failure was due to excusable neglect; and (6) whether there is any prejudice to the opposing party. *Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1583 (Fed. Cir. 1994).

If an appellant is claiming that his appeal was untimely filed as a result of an illness, he must: (1) Identify the time period during which he suffered from the illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness prevented him from timely filing his appeal or requesting an extension of time to file. *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437 (1998). Although medical evidence is preferable as evidence supporting a claim that there is good cause for waiver of the Board's deadline for filing due to a physical or mental illness, there is no reason to limit the supporting evidence to only medical evidence if the appellant explains why medical evidence is unavailable. To establish good cause for waiver of the Board's filing deadline based on physical or mental illness, there is no general incapacitation requirement; rather, the appellant is required to explain only why his alleged illness impaired his ability to meet the Board's filing deadline or to seek an extension of time.

In my November 22, 2011 Order to Show Cause on Jurisdiction and Timeliness, I informed the appellant that his appeal appeared to be untimely filed

and that he has the burden of proof on the timeliness issue. I directed him to file evidence and argument showing that his appeal was timely filed, or that good cause existed for the delay. AF, Tab 5.

The appellant replied to the Order, arguing that he has known since February 2011 that he, as a preference eligible, has a right to appeal constructive suspensions to the Board. He indicated that he has in fact already filed two previous Board appeals challenging constructive suspensions in 2005 and 2009. He asserted, however, that the agency did not notify him of a right to appeal in this instance. In addition, he contended that he was not aware that he could file an appeal of a constructive suspension based on intolerable working conditions until “a few days before I filed the August 15, 2011 appeal,” when he was doing research on his case and noticed that he had another possible right of appeal. AF, Tab 8, pp. 1-3.

The agency replied to the Order and moved that the appeal be dismissed as untimely filed. AF, Tab 9.

The appellant has not shown good cause for waiving the filing deadline in this appeal.

First, I find that the appellant’s delay of 32 days, 115 days, or 207 days, respectively, in filing his appeal was not minimal. *See, e.g., Washington v. Department of Veterans Affairs*, 69 M.S.P.R. 86, 88-89 (1995) (a delay of one day is minimal) (Member Amador, dissenting); *D’Aquin v. Office of Personnel Management*, 65 M.S.P.R. 499, 506 (1994) (a delay of three weeks is not minimal) (Chairman Erdreich, dissenting).

Second, assuming that the appellant was in fact constructively suspended, and assuming that the agency had a duty to notify him of his appeal rights from such an action, then the record reflects that the agency did not inform him of his right to file an appeal with the Board within 30 calendar days, because the agency never issued a decision on this matter. Thus, the appellant was not notified of the

deadline for filing. *See Shiflett v. U.S. Postal Service*, 839 F.2d 669, 673 (Fed. Cir. 1988).

Nonetheless, if an employee knows of the appeal rights in an involuntary action case, even absent any formal notice from the employer, delay is not excused. *See Blair v. Department of Navy*, 6 M.S.P.R. 375, 377 (1981). Prior to this appeal, the appellant has exercised his appeal rights to the Board more than once.⁵ Specifically, the appellant admitted that he has filed previous appeals with the Board. According to the appellant's December 7, 2011 declaration, he indicated that he filed earlier Board appeals challenging alleged improper suspensions and so he was well aware that such actions could be appealed to the Board and he was cognizant of his burden of proof in such actions. AF, Tab 8.

In his appeal form for the constructive suspension in 2009, the following instructions were given regarding the appellant's appeal:

WHEN TO FILE AN APPEAL: Except as indicated below, you must file your appeal during the period that begins on the day after the

⁵ What follows is a list of all of the appellant's previous appeals to the Board. *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-1 (Initial Decision, Oct. 21, 2005) (Administrative Judge Barbara S. Mintz dismissed the appellant's appeal of the agency's action placing him on enforced leave, finding that he lacked a legally cognizable interest in the outcome of the appeal after the suspension was rescinded and he was returned to the status quo ante); *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-2 (Initial Decision, May 1, 2006) (Administrative Judge Mintz dismissed as moot the appellant's refiled appeal of the agency's action placing him on enforced leave); *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-I-1 (Initial Decision, Jan. 12, 2010) (Administrative Judge Thomas P. Cook reversed the agency's imposition of a 21-day suspension, finding that the agency failed to provide the appellant with minimum due process before suspending him); *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-C-1 (Initial Decision, Jan. 11, 2011) (Administrative Judge Michelle M. Hudson denied the appellant's petition for enforcement, finding the agency submitted documentation showing that his health benefits covering the period of his suspension at issue in the appeal were restored); *Noble v. U.S. Postal Service*, MSPB Docket No. DC-3443-11-0235-I-1 (Initial Decision, Apr. 1, 2011) (Administrative Judge Sherry A. Zamora dismissed the appellant's appeal of the agency's action denying his request for holiday pay); and *Noble v. U.S. Postal Service*, MSPB Docket. No. DC-0752-11-0880-1-1 (Initial Decision, Dec. 14, 2011) (I affirmed the agency's decision removing the appellant).

effective date, if any, of the action or decision you are appealing, and ends on the 30th calendar day after the effective date, or on the 30th calendar day after the date you received the agency's decision, whichever is later. (You may not file your appeal before the effective date of the action or decision.) If your appeal is late, it may be dismissed as untimely. See 5 C.F.R. 1201.22 (b) and (c).

AF, Tab 9, Exhibit.

Moreover, the appellant admitted in his December 7, 2011 declaration that he was familiar with the concept of "constructive suspensions" and that when he had been suspended on previous occasions he was aware that he could exercise appeal rights to the Board. Indeed, he has filed timely appeals to the Board in the past within the required 30 days following the effective date of the actions. I find that, with this direct and demonstrated knowledge of appeal time limits, the appellant is without excuse to have waited seven months to do additional research to "discover" new appeal rights when he expressly believed that that had been constructively suspended.

The critical element in determining whether good cause exists for waiving the untimely filing of an appeal is whether an employee acted promptly and within allowable time limits once he was aware of a basis for his claim. *See, e.g., Gordy v. Merit Systems Protection Board*, 736 F.2d 1505, 1508 (Fed. Cir. 1984); *Blair*, 6 M.S.P.R. at 377. Here, because the appellant waited so long to file an appeal with the Board, the evidence shows that he did not act diligently.

In addition, the appellant made no showing of specific circumstances beyond his control that affected his ability to comply with the time limits. Nor did he make any showing of unavoidable casualty or misfortune, or excusable neglect. In *Jones v. U.S. Postal Service*, 65 M.S.P.R. 306 (1994), the Board held that the appellant's delay should be factored into the discretionary decision to waive the time limit; the more he delays, the less likely the equities will weigh in his favor. *See id.* at 311 (citing *Clark v. U.S. Postal Service*, 989 F.2d 1164, 1170 (Fed. Cir. 1993)). I find that in the instant case, the length of the delay

coupled with the lack of a reasonable excuse for such a lengthy delay militates against acceptance of the appeal. The appellant also did not argue that he suffered from a medical condition that impaired his ability to meet the Board's filing deadline or to seek an extension of time.

Next, while there is no apparent prejudice to the agency from the delay, I find that the appellant has not shown good cause for waiving the filing deadline. Based on the appellant's failure to demonstrate good cause for his untimely filing, I find that this appeal must be dismissed. *See Cheguina v. Merit Systems Protection Board*, 69 F.3d 1143, 1146-47 (Fed. Cir. 1995), *cert. denied*, 518 U.S. 1019 (1996).

Alternatively, if, as the appellant argued in his response to the Board's Order to Show Cause on Timeliness, he did not learn of his appeal rights for a constructive suspension based on intolerable working conditions until say, August 13, 2011 ("a few days before I filed the August 15, 2011 appeal"), then I find he needed to file his appeal on or before September 12, 2011, and his appeal was untimely filed by 11 days. The appellant offered no reason for why he waited 11 days to file an appeal after he "discovered" this new right of appeal. Consequently, based on these set of facts, I still would find that the appellant was not diligent in filing his appeal after, as he claimed in his response to the Show Cause Order, he learned he could do so.

I therefore dismiss the appellant's appeal as untimely filed.⁶

⁶ Because of my ruling on the timeliness issue, I need not rule on the agency's motion to compel.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

_____/S/_____
 Daniel Madden Turbitt
 Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **March 20, 2012**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
 Merit Systems Protection Board

1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

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

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.