

**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: November 22, 2011

ORDER TO SHOW CAUSE

There is a question whether this appeal is untimely filed and within the Board's jurisdiction. As a result, the Board might dismiss the appeal as untimely filed or for lack of jurisdiction without addressing the merits of the case. This Order provides necessary information concerning the timeliness and jurisdictional issues and steps you, the appellant, must take to show that the Board should not dismiss the appeal as untimely filed or for lack of jurisdiction. You, the appellant, seem to be arguing that you were subjected to a constructive suspension between the dates of January 14, 2011 through July 23, 2011, due to intolerable working conditions.

A. TIMELINESS

There is a question whether you timely filed an appeal of your constructive suspension claim within the deadline required by the Board's regulations. As a result, the Board might dismiss your constructive suspension claim as untimely filed without addressing the merits of that issue. This Order provides necessary information concerning the timeliness issue and steps you must take to show that the Board should not dismiss the constructive suspension claim as untimely. I **ORDER** the parties to follow the procedures set out below.

Notice and Order to the Appellant

With certain exceptions that are not relevant to this case, an employee must file an appeal with the Board no later than 30 calendar days after the effective date, if any, of the action he is challenging, or 30 days from the date he received the agency's decision, whichever is later. *See* 5 C.F.R. §§ 1201.22(b); 1209.5(b). Here, in your appeal, you wrote that you received the agency's final decision letter on July 6, 2011, and that the effective date of the action you are challenging occurred on July 22, 2011.

In the prehearing submissions you filed in your removal action, you noted that you believe you were subjected to a constructive suspension. According to your September 1, 2011 declaration, you indicated that you have filed previous Board appeals challenging alleged improper suspensions and so you are well aware that such actions may be appealed to the Board and you are cognizant of your burden of proof in such actions. In fact, it seems you may have filed two or three appeals of alleged or actual suspensions. *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-1 (Initial Decision, Oct. 21, 2005) (AJ dismissed appeal of agency's action placing you on enforced leave); *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-2 (Initial Decision, May 1, 2006) (AJ dismissed as moot your refiled appeal of agency action placing you on enforced leave); *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-I-1 (Initial Decision, Jan. 12, 2010) (AJ reversed agency's imposition of a 21-day suspension).

Based on my review of your prehearing submissions and the comments you made during the second prehearing conference in your removal appeal, it appears that you are claiming the agency constructively suspended you from January 14, 2011 "to date." If that is true, then you first had a right to appeal to the Board 30 days after January 29, 2011 (at which point the suspension had elapsed beyond 14 days from January 14th, when you claim the suspension period began).

Although you said you believed the agency was continuing to constructively suspend you, the record clearly reflects that you were removed from the federal service on July 24, 2011, and so you could not possibly have been subjected to a constructive suspension after you were no longer employed by the government.¹ The date of filing an e-filed appeal is based on the e-filing submission date noted in the lower portion of the Board's appeal form. According to your appeal, you filed your e-file appeal on August 15, 2011. Thus, it appears as if your appeal was untimely filed by more than seven months (if January 29, 2011 is the correct filing date).

You, the appellant, have the burden of proving that your appeal was timely filed, or that good cause exists for the delay. To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Dep't of the Air Force*, 4 M.S.P.R. 180, 184 (1980). To determine if an individual has shown good cause for an untimely filing, the Board will consider the length of the delay, the reasonableness of the appellant's excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file a petition. *See Moorman v. Dep't of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¹ Further, the record reflects that, in removing you, the agency charged you as being absent without leave (AWOL). Thus, based on what you are arguing, the agency placed you on constructive suspension from January 14, 2011, until the date when you were charged as AWOL. In your response to this Order, you must clarify when you believe the AWOL period began and ended, and when you believe the constructive suspension period began and ended, and state why you believe this.

If you are claiming that your appeal was untimely filed as a result of an illness, you must: (1) identify the time period during which you suffered from the illness; (2) submit medical evidence showing that you suffered from the alleged illness during that time period; and (3) explain how the illness prevented you from timely filing your appeal or requesting an extension of time to file. *Lacy v. Dep't 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 you explain 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, you are required to explain only why your alleged illness impaired your ability to meet the Board's filing deadline or to seek an extension of time.

You are **ORDERED** to submit factual evidence on this issue within 15 days of the date of this Order. This evidence must be received by the Board and the agency within 15 days. Your response to this Order must be in the form of an affidavit, sworn statement, or declaration under penalty of perjury, 28 U.S.C. § 1746, a form for which is found in the Board's regulations at 5 C.F.R. Part 1201, Appendix IV. Although there are limited circumstances in which a hearing may be held on the question of the timeliness of an appeal, you should submit all evidence and argument you wish me to consider on that issue, and not withhold anything in expectation that a hearing may be held.

If there is no hearing in this appeal, the record will close on this issue 20 days from the date of this Order. That means that no evidence on this issue received after that date will be accepted unless accompanied by information showing that it is new and material evidence not available before the record closed. 5 C.F.R. § 1201.58(c). If your appeal is untimely filed and you fail to establish good cause for waiving the filing deadline, the appeal will be dismissed.

ORDER TO THE AGENCY

The agency is **ORDERED** to file any evidence that it has on the timeliness issue, so that it is received within 20 calendar days of the date of this Order, and may submit argument as well.

B. JURISDICTION

The Board may not be able to exercise jurisdiction over your appeal. Constructive suspension claims generally arise in two situations: (1) when an agency places an employee on enforced leave pending an inquiry pending his ability to perform; or (2) when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Hamiel v. U.S. Postal Service*, 104 M.S.P.R. 497, ¶ 4 (2007). Proof of intolerable working conditions compelling an employee to be absent, however, may also support a finding of a constructive suspension in certain circumstances where the employee also shows that he put the agency on notice of the objectionable working conditions and requested assistance or remediation from the agency. *See Brown v. U.S. Postal Service*, 115 M.S.P.R. 88, ¶ 8 (2010); *Sage v. Dep't of the Army*, 108 M.S.P.R. 398, ¶ 5 (2008); *Peoples v. Dep't of the Navy*, 83 M.S.P.R. 216, ¶¶ 5-11 (1999).

You must make nonfrivolous allegations of fact that the Board has jurisdiction over your appeal as a constructive suspension. Specifically, you must allege facts, which if proven, would show that your working conditions were so intolerable that a reasonable person in your position would have been compelled to absent him or herself from the workplace. *See Wegener v. Dep't of the Interior*, 89 M.S.P.R. 644, ¶ 13 (2001); *Peoples*, 83 M.S.P.R. 216, ¶¶ 5-7. In addition, you must allege facts, which if proven, would demonstrate both that you put the agency on notice of the existence of the objectionable working conditions and that you requested assistance or remediation from the agency. *Wegener*, 89 M.S.P.R. 644, ¶ 13; *Peoples*, 83 M.S.P.R. 216, ¶¶ 8-9.

If you make nonfrivolous allegations of fact that your absences were involuntary, you will be entitled to a jurisdictional hearing on your constructive suspension claim. *Peoples*, 83 M.S.P.R. 216, ¶ 13. In constructive adverse actions, subject matter jurisdiction and the merits of the appeal are intertwined. *Heath v. U.S. Postal Service*, 107 M.S.P.R. 366, ¶ 6 (2007). Therefore, nonfrivolous allegations do not establish jurisdiction; rather, the appellant must prove by preponderant evidence that the act was involuntary to establish jurisdiction. *Id.*; see *Mojarro v. U.S. Postal Service*, 113 M.S.P.R. 335, ¶ 11 (2010).

Unless you present a nonfrivolous allegation of jurisdiction, supported by the production of factual evidence, the appeal will be dismissed for lack of jurisdiction without benefit of a hearing. See *Scharf v. Dep't of the Air Force*, 710 F.2d 1572, 1574 (Fed. Cir. 1983). There is no law that requires the Board to hold a hearing on the threshold issue of jurisdiction. However, if you make a nonfrivolous allegation that the Board has jurisdiction over this appeal, you would be entitled to a hearing on the jurisdictional question. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985). Nonfrivolous allegations of Board jurisdiction are allegations of facts which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter in issue. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

You have the burden of proving that the instant appeal is within the Board's jurisdiction and that the Board should grant you a hearing. 5 C.F.R. § 1201.56(a)(2). You, therefore, are **ORDERED** to submit factual evidence on these issues within 15 days of the date of this Order. This evidence must be received by the Board within 15 days.

I also **ORDER** the agency to file a response on this jurisdictional issue, to be received within 20 calendar days of the date of this Order. Unless I tell the parties otherwise, the record on this issue will close on the date the agency's response is due. That means I will not accept any more evidence or argument

prior to making a finding on whether the appellant has made a non-frivolous allegation on the jurisdictional issue unless the party submitting the evidence or argument shows that it was not readily available prior to the close of the record. 5 C.F.R. § 1201.58(c). If there is no jurisdiction, the appeal will be dismissed. If there is jurisdiction, the appeal will be processed and a hearing will be conducted.

FOR THE BOARD:

_____/S/_____
Daniel Madden Turbitt
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail David Noble
1 Fenceline Drive
Gaithersburg, MD 20878

Agency Representative

Electronic Mail Stephen W. Furgeson
United States Postal Service
Capital Metro Law Office
8200 Corporate Drive
Landover, MD 20785-2200

November 22, 2011

(Date)

/s/

Tonya Holman
Legal Assistant