

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

98 M.S.P.R. 115

LINDA CRUMPTON,
Appellant,

DOCKET NUMBER
AT-0752-04-0205-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: December 30, 2004

Linda Crumpton, Montgomery, Alabama, pro se.

Robert E. Norman, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Susanne T. Marshall, Member
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND this appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed a partially completed petition for appeal form on November 13, 2003. Initial Appeal File (IAF), Tab 1. The appellant did not

provide information in the blocks of the form that inquire about the agency action she was seeking to appeal, the date she received written notice of that proposed agency action, the date she received the final decision notice of the agency's action, or the effective date of the agency's action. *Id.* at 3. The regional office returned the appeal form to the appellant with a November 20, 2003 letter informing her that within ten days after her receipt of the letter she must refile a corrected appeal that clearly indicated what agency action she was attempting to appeal and the effective date of that action. *Id.* at 1.

¶3 The appellant refiled the appeal on December 11, 2003, and once again failed to state the agency action she was appealing and the effective date of that action. *Id.* at 11. The appellant merely indicated that she was appealing the fact that "no discrimination was found in my EEOC [Equal Employment Opportunity Commission] appeal" and she requested a hearing. *Id.* at 5, 11. The appellant submitted with her petition for appeal form what appears to be her March 14, 2002 appeal to the EEOC of a February 5, 2002 final agency decision and a September 2, 2003 agency cover letter regarding another final agency decision on a discrimination complaint she had filed with the agency, Case Number 00-1153M. IAF, Tab 1 at 9-10. However, the appellant did not submit either of the final agency decisions. The administrative judge (AJ) assigned to the case issued a February 11, 2004 order directing the appellant to contact him within 7 days of the date of the order to inform him of the specific agency action that the appellant was seeking to appeal and informing her that if she failed to do so the appeal would be treated as an appeal of an adverse decision by the EEOC. IAF, Tab 5. The appellant did not respond to that order.

¶4 The AJ then issued a February 25, 2004 jurisdictional order in which he informed the appellant that the Board does not have jurisdiction over an adverse decision of the EEOC unless it involves an agency action that is otherwise appealable to the Board, and he ordered the appellant to file evidence and argument showing that her appeal is within the Board's jurisdiction within 4

calendar days of the date of the order. IAF, Tab 6. The order also allowed the agency to file a response to the order within 4 calendar days of the order. *Id.* The agency's February 26, 2004 response to the order acknowledged that the appellant had participated in the EEOC complaint process and had filed an appeal with the EEOC, Office of Federal Operations. IAF, Tab 7. But, it asserted that the appellant had failed to show that she was appealing an agency action within the Board's jurisdiction. *Id.*

¶5 In the February 27, 2004 initial decision, the AJ found that the appellant was attempting to appeal an adverse ruling by the EEOC on a discrimination complaint. Initial Decision (ID) at 1. The AJ found that the Board does not have jurisdiction over claims of discrimination unless they are raised in conjunction with an agency action that is otherwise appealable to the Board. ID at 1, 3. The AJ found that the appellant was afforded three opportunities to specify an agency action over which the Board has jurisdiction but that she failed to do so. ID at 2-3. Accordingly, the AJ dismissed the appeal for lack of jurisdiction. ID at 1, 3.

¶6 The appellant filed a March 3, 2004 response to the AJ's February 25, 2004 jurisdictional order, which the regional office forwarded to the Board as a petition for review. Petition For Review File (PFRF), Tabs 1-2. The appellant asserts that she received the AJ's order on February 28, 2004, and that the AJ dismissed her appeal before she could respond to the order. Further, she now asserts, in effect, that her appeal of the final agency decision on her discrimination complaint in Case Number 00-1153M involves her alleged involuntary resignation in 2000 from the position of GS-7 Tax Examiner as a result of the agency's retaliation against her for her filing of a discrimination complaint with the EEOC in 1999. PFRF, Tab 1. The appellant asserts that she filed her Board appeal because that is what she was instructed to do in a notice attached to the final agency decision. *Id.* The agency has filed a response in opposition to the appellant's petition. PFRF, Tab 3.

ANALYSIS

¶7 The appellant asserts that the AJ prematurely issued the initial decision and that she was prejudiced as a result of the prematurely issued decision. PFRF, Tab 1. For the reasons set forth below, we find that the appellant's assertion has merit under the circumstances of this case.

¶8 The AJ's February 25, 2004 jurisdictional order afforded the appellant 4 calendar days in which to respond to the order, but the AJ then issued the initial decision dismissing the appeal on February 27, 2004. IAF, Tabs 6, 8. Thus, the AJ prematurely issued the initial decision prior to the expiration of the time in which the appellant was allowed to respond. The Board has long recognized that it is error for an AJ to issue an order or initial decision prior to the expiration of the time allowed for a party's response. *E.g.*, *Edeburn v. U.S. Postal Service*, 95 M.S.P.R. 486, ¶ 7 (2004); *Gala v. U.S. Postal Service*, 38 M.S.P.R. 474, 477-78 (1988), *aff'd*, 878 F.2d 1445 (Fed. Cir.) (Table), *cert. denied*, 493 U.S. 942 (1989). Where such a procedural error appears, the Board will determine whether the affected party's substantive rights were harmed. *Edeburn*, 95 M.S.P.R. 486, ¶ 7; *Gala*, 38 M.S.P.R. at 478. The proponent of the alleged error bears the burden of demonstrating that the error adversely affected those rights. *Edeburn*, 95 M.S.P.R. 486, ¶ 7; *Gordon v. Department of the Army*, 83 M.S.P.R. 545, ¶ 6 (1999), *review dismissed*, 230 F.3d 1380 (Fed. Cir. 2000) (Table). Absent an adverse effect on substantive rights, the error is harmless and of no legal consequence. *Id.*

¶9 Because the AJ prematurely issued the initial decision prior to the expiration of the time limit for the appellant's response to the jurisdictional order, we have considered the appellant's assertion in her purported petition for review regarding the Board's jurisdiction over her appeal. *See Edeburn*, 95 M.S.P.R. 486, ¶ 7; *Tackett v. Department of Agriculture*, 89 M.S.P.R. 348, ¶ 8 (2001); *O'Reilly v. U.S. Postal Service*, 80 M.S.P.R. 693, ¶ 8 (1999). Although still not specific, the appellant asserts, in effect, that she is appealing a final agency

decision on a discrimination complaint that involved her alleged involuntary resignation in 2000 as a result of the agency's retaliation against her for filing a discrimination complaint with the EEOC in 1999. PFRF, Tab 1. Resignations are presumed voluntary. *E.g., Matthews v. U.S. Postal Service*, 93 M.S.P.R. 109, ¶ 9 (2002). An involuntary resignation, however, is tantamount to a removal over which the Board has jurisdiction. *Id.*

¶10 An appellant who has been subjected to an action appealable to the Board and believes that the action was based on discrimination may either file a timely discrimination complaint with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or within 30 days after the date of receipt of the agency's decision on the appealable action, whichever is later. 5 C.F.R. § 1201.154(a). However, an employee may not file both a discrimination complaint with the agency and a Board appeal regarding the same subject matter; whichever is filed first is considered to be an election of that forum. *Social Security Administration v. Harty*, 96 M.S.P.R. 65, ¶ 15 (2004); *Duffy v. U.S. Postal Service*, 93 M.S.P.R. 405, ¶ 6 (2003). Under 5 C.F.R. § 1201.154(b)(1), (2), if the employee first files a formal complaint with her agency, she then must file a Board appeal within 30 days after she receives the agency resolution or final decision on the discrimination issue, or, if the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, she may appeal the matter directly to the Board at any time after the expiration of 120 calendar days. *Wegener v. Department of the Interior*, 89 M.S.P.R. 644, ¶ 9 (2001).

¶11 Although the appellant has not yet raised a nonfrivolous allegation of the Board's jurisdiction over her appeal, she has asserted an otherwise appealable action over which the Board could have jurisdiction. Thus, she is entitled to notice of her burdens of proof to establish the Board's jurisdiction over her appeal of the final agency decision involving her alleged involuntary resignation, as well as the timeliness of her appeal. *See Matthews*, 93 M.S.P.R. 109, ¶¶ 7, 9-11;

Tackett, 89 M.S.P.R. 348, ¶ 11. We remand this appeal so that the AJ may fully inform the appellant of what she is required to allege to establish the Board's jurisdiction over an involuntary resignation appeal and to fully inform the appellant of her burden to prove that her appeal has been timely filed or that good cause exists for her delayed filing. The AJ shall afford the parties a reasonable opportunity to submit evidence and argument regarding those issues. If the AJ finds that the appellant has raised a nonfrivolous allegation that her appeal is within the Board's jurisdiction and was timely filed or that good cause exists for a delay in filing her appeal, the AJ shall afford her a hearing on the jurisdictional issue.

ORDER

¶12 Accordingly, we VACATE the initial decision and REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.