

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

**2008 MSPB 64**

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Docket No. DC-0752-07-0665-I-1

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**Joseph V. Arrieta,  
Appellant,**

**v.**

**Department of Homeland Security,  
Agency.**

March 17, 2008

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Joseph V. Arrieta, Fredericksburg, Virginia, pro se.

Travis Q. Elliott, Esquire, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision (ID) that dismissed his appeal as withdrawn. For the reasons set forth below, we DISMISS the petition for review (PFR) as untimely filed without good cause shown for the delay, but we FORWARD the PFR to the Washington Regional Office for docketing and processing as a separate appeal challenging the continuation of the appellant's indefinite suspension.

**BACKGROUND**

¶2 The appellant is employed by the agency as a Deportation Officer, GS-11. *See* Initial Appeal File (IAF), Tab 1 at 4. On March 30, 2007, the agency

informed the appellant that his authorization to carry a badge, credentials, and a personal firearm had been suspended. IAF, Tab 6, Subtab 4g. On the same day, the agency proposed the appellant's indefinite suspension pending the completion of an investigation by the agency's Office of Inspector General (OIG) into allegations of misconduct by the appellant. *Id.*, Subtab 4f at 1.

¶3 The agency gave the appellant 10 days to respond to the proposed suspension. *Id.* at 2. The appellant requested and received an extension of time to submit a response. IAF, Tab 6, Subtab 4d. However, it does not appear that the appellant ever responded, either orally or in writing, to the proposed suspension. *See id.*, Subtab 4c at 1. On May 10, 2007, the agency issued a final decision suspending the appellant effective May 27, 2007. *Id.* In its final decision, the agency indicated that the suspension would be terminated, and the appellant would be returned to a paid duty status, when the OIG completed its investigation. *Id.* The agency further indicated, however, that in the event that an adverse action was proposed against the appellant, the suspension would continue through the notice period for that action. *Id.*

¶4 On May 29, 2007, the appellant, through his attorney, filed a Board appeal challenging his indefinite suspension. IAF, Tab 1. He requested a hearing. *Id.* at 4. On July 13, 2007, the parties filed a joint motion to suspend processing of the appeal for 30 days in order to permit the parties to complete discovery and discuss settlement. IAF, Tab 10. The administrative judge (AJ) granted the joint motion that day. IAF, Tab 11. On August 3, 2007, the appellant moved to withdraw his appeal. IAF, Tab 13. In his motion to withdraw the appeal, the appellant indicated that the OIG investigation, upon which his indefinite suspension was based, had been completed. *Id.* He stated that he therefore did not want to pursue his Board appeal. *Id.* The AJ issued an ID dismissing the appeal as withdrawn on August 7, 2007. IAF, Tab 14.

¶5 On November 26, 2007, the appellant, acting pro se, filed a request to reopen his appeal. PFR File, Tab 1. He argued that he had not been returned to

paid status upon receiving the OIG final investigation. *Id.* The Washington Regional Office forwarded the appellant's submission to the Clerk of the Board for processing as a PFR. *Id.* The Clerk informed the appellant that his PFR appeared to be untimely filed and invited him to file a motion to accept the filing as timely and/or to waive the time limit for filing for good cause. PFR File, Tab 2. The appellant filed such a motion on December 11, 2007. PFR File, Tab 5. He argued that, at the time he withdrew his appeal, he did not realize that the agency would improperly extend his indefinite suspension beyond the completion of the OIG investigation. *Id.* at 2. The appellant attached to his motion a notice of proposed removal dated October 29, 2007. *Id.* at 6-8. The agency has not responded to the PFR.

#### ANALYSIS

¶6 The appellant requested that the AJ reopen his indefinite suspension appeal. PFR File, Tab 1. The Clerk of the Board processed that request as a PFR. PFR File, Tab 2. Considering the submission as such, it appears to be untimely filed. Generally, a PFR must be filed within 35 days of the date of issuance of the ID. 5 C.F.R. § 1201.114(d). The ID in this case was issued on August 7, 2007; therefore, the last day that the appellant could have filed a timely PFR was September 11, 2007. The appellant filed this PFR with the Board on November 26, 2007. PFR File, Tab 1. The appellant's petition therefore was untimely by more than 2 months.

¶7 The Board will waive its time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. § 1201.114(f). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his 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 his petition. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table). The appellant's only justification for his delay in filing his PFR is that he did not know that the agency would continue his indefinite suspension beyond the completion of the OIG investigation. PFR File, Tab 5 at 2. However, the appellant indicated in his August 3, 2007 motion to withdraw his appeal that the OIG investigation had been completed. IAF, Tab 13. Therefore, by September 11, 2007, the deadline for filing a timely PFR, the appellant knew that his suspension had been continued for more than a month beyond the completion of the OIG investigation. Accordingly, we find that the appellant has failed to show good cause for his delay in filing, and we DISMISS the PFR as untimely filed.

¶8 However, we find that the appellant's submission should also be considered as a separate appeal challenging the continuation of his indefinite suspension. "[T]o be valid, an indefinite suspension must have an ascertainable end, that is, a determinable condition subsequent that will bring the suspension to a conclusion." *Cooper v. Department of Health & Human Services*, 80 M.S.P.R. 612, ¶ 5 (1999). An indefinite suspension may extend through the completion of both a pending investigation and any subsequent administrative action. See 5 C.F.R. § 752.402(e). In such circumstances, however, an agency must initiate administrative action within a reasonable period of time after completion of the pending investigation. *Engdahl v. Department of the Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990); see *Campbell v. Defense Logistics Agency*, 31 M.S.P.R. 691, 693, 695 (1986) (where the appellant's indefinite suspension was based on an indictment, the agency acted reasonably by proposing the appellant's removal 9 days after it learned of the appellant's guilty plea and continuing the indefinite suspension until the effective date of the appellant's removal), *aff'd*, 833 F.2d 1024 (Fed. Cir. 1987) (Table). To permit the agency to take an unlimited amount of time to determine what action to take while keeping the appellant on an indefinite suspension would run contrary to the requirement that an indefinite

suspension have an ascertainable end. *See Martin v. Department of the Treasury, U.S. Customs Service*, 12 M.S.P.R. 12, 17, 20 (1982), *aff'd in part, rev'd in part on other grounds sub nom. Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), and *aff'd sub nom. Otherson v. Department of Justice, I.N.S.*, 728 F.2d 1513 (D.C. Cir. 1984), *modified on other grounds by Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 663 n.5 (1984).

¶9 Our reviewing court recently held that the imposition of an indefinite suspension and the failure to terminate that suspension after the condition subsequent has occurred are separately reviewable agency actions. *Rhodes v. Merit Systems Protection Board*, 487 F.3d 1377, 1381 (Fed. Cir. 2007). In *Rhodes*, the United States Court of Appeals for the Federal Circuit held that an employee's election to grieve the imposition of his indefinite suspension did not preclude him from filing a Board appeal challenging the continuation of that suspension beyond the condition subsequent. *Id.* Applying the same logic to the present case, we find that the appellant's withdrawal of his appeal challenging the imposition of his indefinite suspension does not preclude him from filing a separate appeal challenging the continuation of that suspension. His November 26, 2007 submission is clearly an attempt to challenge the continuation of the indefinite suspension. *See* PFR File, Tab 1.

¶10 In suspending the appellant indefinitely, the agency established the completion of the OIG investigation as the condition subsequent that would bring the suspension to a conclusion. IAF, Tab 6, Subtab 4c at 1. It appears from the appellant's motion to withdraw his appeal that the OIG investigation was completed no later than August 3, 2007. IAF, Tab 13. However, the agency did not propose the appellant's removal until October 29, 2007, almost 3 months later. *See* PFR File, Tab 5 at 6-8. Although the agency explicitly reserved the right to extend the appellant's indefinite suspension through the notice period of any proposed adverse action, IAF, Tab 6, Subtab 4c at 1, it was required to initiate such an action within a reasonable time after the completion of the OIG

investigation, *Engdahl*, 900 F.2d at 1578. Without knowledge of the attendant circumstances, we are unable to determine whether the agency proposed the appellant's removal within a reasonable time after the completion of the OIG investigation. Under the circumstances, it is appropriate to forward the appellant's claims regarding the continuation of his indefinite suspension to the regional office for adjudication. *See Romero v. Department of Defense*, 104 M.S.P.R. 245, ¶ 12 (2006).

#### ORDER

¶11 Accordingly, we FORWARD the appellant's PFR to the Washington Regional Office for docketing and processing as a separate appeal challenging the continuation of his indefinite suspension beyond the completion of the OIG investigation.

¶12 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the PFR. The ID remains the final decision of the Board with regard to the merits of the imposition of the appellant's indefinite suspension. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

#### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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.cafc.uscourts.gov](http://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:

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