

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

**2006 MSPB 229**

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Docket No. SF-0752-06-0167-I-1

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**Fernando S. Eagleheart,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

August 1, 2006

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James D. Schumacher, Reno, Nevada, for the appellant.

April M. Molinelli, Esquire, San Francisco, California, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision (ID) that dismissed his appeal as settled. For the reasons set forth below, we DISMISS the petition for review (PFR) as untimely filed.

**BACKGROUND**

¶2 In November 2005, the preference-eligible appellant filed an appeal challenging the agency's decision to remove him from his position as a PS-03 Custodian for Unacceptable Conduct – Mistreatment of Mail Matter. Initial Appeal File (IAF), Tab 1. On December 22, 2005, the parties reached a

settlement agreement in which the appellant agreed to withdraw his appeal in exchange for the agency's agreement to rescind the removal, to allow the appellant to resign for personal reasons, and to not seek prosecution of the appellant for his actions.<sup>1</sup> *Id.*, Tab 6. The administrative judge (AJ) determined that the settlement agreement was lawful, that the parties understood the agreement, and that it was entered into freely by both parties. ID at 1-2. She therefore accepted it into the record and dismissed the appeal as settled on December 23, 2005. ID at 2. The AJ informed the parties that the decision would become final on January 27, 2006, unless a PFR was filed by that date. *Id.*

¶3 On March 3, 2006, the appellant filed submissions with the Board's Western Regional Office alleging that he was "forced, coerced, intimidated and threatened with arrest and jail" unless he resigned. Petition for Review File (PFRF), Tab 1. He also claimed that he attempted to withdraw his resignation the same day that he signed the agreement, but the agency intentionally ignored his request. *Id.*

¶4 The Western Regional Office forwarded the appellant's submissions to the Office of the Clerk of the Board. Because the appellant appeared to be alleging that his resignation was coerced, and because that resignation was the result of the settlement agreement that resolved his original appeal, the Office of the Clerk of the Board informed the appellant that it was considering his correspondence as a PFR of the ID in that appeal. *Id.*, Tab 2. The Clerk further informed the appellant that the challenge to the ID dismissing his appeal as settled was untimely filed, and that he must submit an affidavit or statement signed under penalty of perjury showing good cause for his late filing. *Id.*

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<sup>1</sup> As discussed below, on the same day that the appellant signed the settlement agreement, the union filed a grievance on the appellant's behalf seeking to rescind the agreement on the grounds that the agency had coerced the appellant into resigning. Petition for Review File (PFRF), Tab 4, Subtab C.

¶5 In response, the appellant argues that good cause for the untimely filing of his PFR exists because agency representatives did not notify him of his Board appeal rights while his December 22, 2005 grievance requesting rescission of the settlement agreement was pending with the agency. PFRF, Tab 3. The appellant states that he filed the PFR shortly after learning of the February 21, 2006 decision denying his grievance. *Id.* In addition, the appellant argues the merits of his involuntary resignation claim and asserts that the agency has not complied with the agreement.<sup>2</sup> *Id.* The agency has filed a response in which it argues that the Board should dismiss the PFR as untimely with no good cause for the delay. In the alternative, the agency argues that reversal of the ID is not warranted because the appellant's resignation was voluntary. PFRF, Tab 4. The appellant has filed a reply, which addresses the merits of his claim but not the timeliness of his PFR. PFRF, Tab 5.

#### ANALYSIS

¶6 A petition for review must be filed within 35 days after the initial decision was issued, or, if the petitioner shows that he received the initial decision more than 5 days after its date of issuance, within 30 days of his receipt of the initial decision. 5 C.F.R. § 1201.114(d). The Board will waive its filing deadline only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). The appellant bears the burden of proof with regard to timeliness, which he must establish by preponderant evidence. *Peterson v. Department of*

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<sup>2</sup> Regarding the appellant's allegations of agency noncompliance with the settlement agreement, the Board has held that an issue raised concerning the interpretation of a settlement agreement that is enforceable by the Board, and whether the agency has breached it, is a matter properly addressed in the first instance by the administrative judge as a petition for enforcement. *Owen v. U.S. Postal Service*, 87 M.S.P.R. 449, ¶ 9 (2000). Consequently, if the appellant wishes to pursue his claim that the agency has breached the settlement agreement, he should file a petition for enforcement with the Western Regional Office in accordance with the procedures set forth in the ID. ID at 4-5.

*Health & Human Services*, 50 M.S.P.R. 237, 242 (1991), *aff'd*, 976 F.2d 747 (Fed. Cir. 1992) (Table).

¶7 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. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). 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).

¶8 The appellant seeks review of an ID issued on December 23, 2005, and he has not shown that he received the decision more than 5 days after the date of its issuance. Thus, the deadline for filing a PFR in this case was January 27, 2006. The ID specifically advised the appellant that he could request Board review of the ID if he believed the settlement agreement was unlawful, involuntary, or the result of fraud or mutual mistake. ID at 3. The ID also specifically notified the appellant of the time limit for filing his PFR, but the appellant did not file his petition until March 3, 2006, more than one month later. This filing delay is not minimal and does not provide a basis for waiving the filing deadline. *Robinson v. Office of Personnel Management*, 85 M.S.P.R. 589, ¶ 6 (2000) (an approximately 30-day delay in filing a petition was not minimal and did not provide a basis for waiving the filing deadline), *review dismissed*, 250 F.3d 762 (Fed. Cir. 2000) (Table).

¶9 As noted above, the appellant claims there is good cause for his untimely filing because he filed the petition for review promptly upon learning of the decision on his grievance. PFRF, Tab 3. It appears that the appellant believed he

could file an appeal after exhausting the grievance process, regardless of the length of that process. While a preference-eligible Postal Service employee affected by an action appealable to the Board may both grieve and appeal the same action, each process is subject to the relevant timeliness requirements. *Masdea v. U.S. Postal Service*, 90 M.S.P.R. 556, ¶ 5 (2002). The appellant's decision to wait for a determination on his grievance before filing his PFR does not constitute good cause to waive the regulatory time limit for filing his PFR. *See, e.g., Shimmin v. Department of Justice*, 63 M.S.P.R. 435, 439 (1994) (an appellant's pursuit of appeal rights through other forums does not establish good cause for the untimely filing of a PFR), *aff'd*, 43 F.3d 1486 (Fed. Cir. 1994) (Table).

¶10 The appellant also claims that good cause for the untimely filing of his PFR exists because agency representatives never notified him of his Board appeal rights. PFRF, Tab 3. However, the appellant does not make any showing that agency representatives, as distinct from the Board, were under any duty to instruct him in the proper procedures for seeking Board review. *See Caballero v. Department of the Army*, 59 M.S.P.R. 298, 302 (1993) (failure of appellant's superiors to inform him of the proper procedures for filing a PFR does not establish good cause for the untimely filing of a PFR where appellant does not show they had a duty to notify him of such procedures). Moreover, the appellant cannot rightfully claim that he was unaware of his Board appeal rights because the ID explicitly advised him of these rights and of the procedures for filing a PFR. ID at 2-3. If the appellant was confused about these procedures, he should have contacted the Board for an explanation, or for an extension of time in which to file the petition. *Caldwell v. Department of the Interior*, 58 M.S.P.R. 54, 57 (1993).

¶11 The other arguments in the appellant's response to the Clerk's notice also do not establish good cause for the untimely filing of his PFR. For example, the appellant claims that he does not have a good command of English and sometimes

has difficulty understanding what is written and obtaining access to representation in a timely manner. PFRF, Tab 3. However, the appellant is not pro se and his representative has assisted him since the meeting where the appellant signed the settlement agreement. *Id.* Thus, the appellant's professed difficulty understanding English clearly has not prevented him from obtaining representation in a timely manner and, therefore, does not constitute good cause for the untimely filing of his PFR. *See Ford v. Office of Personnel Management*, 59 M.S.P.R. 66, 69 (1993) (the appellant's alleged inability to read and write is not significant because he had assistance before both the agency and the Board's regional office), *aff'd*, 34 F.3d 1080 (Fed. Cir. 1994) (Table).

¶12 Also, most of the arguments set forth in the appellant's motion to waive the time limit for filing a PFR, as well as in his response to the agency's opposition to this motion, address the merits of his appeal. PFRF, Tabs 1 and 5. Because these arguments are not related to the issue of timeliness, the Board need not consider them. *See Caballero*, 59 M.S.P.R. at 301 (arguments concerning the merits of the case do not pertain to the issue of untimeliness).

¶13 In addition, it is well-settled that an appellant's dissatisfaction with the terms of a settlement agreement does not constitute good cause for his filing delay. *See Ross v. Department of Justice*, 73 M.S.P.R. 211, 213, *aff'd*, 129 F.3d 134 (Fed. Cir. 1997) (Table); *Nease v. Department of the Army*, 68 M.S.P.R. 365, 368-69 (1995). In this case, the appellant admits that he signed a settlement agreement that provided for his resignation. Although the appellant is unhappy with the consequences of the agreement and claims that the agreement was coerced, he has not shown how the circumstances surrounding the settlement agreement interfered with his ability to file a timely PFR. *See Ross*, 73 M.S.P.R. at 214.

¶14 The ID properly notified the appellant of the time limit for filing his PFR, and he was provided an opportunity to explain his untimely filing, but he has not

shown good cause to excuse the delay in filing his PFR. Accordingly, the PFR is dismissed as untimely filed.

### ORDER

¶15 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board in this appeal. 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, <http://fedcir.gov/contents.html>. 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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Bentley M. Roberts, Jr.  
Clerk of the Board  
Washington, D.C.