

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

73 M.S.P.R. 59

Docket Number AT-0752-96-0534-I-1

KENT P. NOBLE, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: January 12, 1997

Kent P. Noble, Boaz, Alabama, pro se.

Peter C. Marcoux, Esquire, Birmingham, Alabama, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision that dismissed his appeal of his reassignment for lack of jurisdiction. For the reasons set forth below, we DISMISS the appellant's petition for review as untimely filed without a showing of good cause for the delay in filing.

BACKGROUND

The appellant filed an appeal of the agency's action reassigning him from a full-time position as a letter carrier, PS-5, to a part-time flexible position as a distribution window clerk, PS-5. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction, concluding that the reassignment did not result in a reduction of grade or pay for the appellant.

The initial decision, dated July 22, 1996, specified that it would become final on August 26, 1996, unless "a petition for review is filed by that date or the Board reopens the case on its own motion." Initial Decision (ID) at 3. See 5 C.F.R. § 1201.114(d) (1996) (providing 35 days to file petition for review after issuance of initial decision). The appellant filed a petition for review postmarked August 28, 1996, unaccompanied by a motion showing good cause for the untimely filing. Petition for Review (PFR) File, Tab 1. On September 4, 1996, the Clerk of the Board notified the appellant that his petition appeared to be untimely filed, and provided him 15 days from the date of the

notice to show good cause for the late filing.¹ PFR File, Tab 2. In response, the appellant timely filed a "Motion To Accept Filing As Timely Or To Waive Time Limit", claiming that he had filed late "to see if the Postal Service was again going to work me less than forty hours in a week." PFR File, Tab 3. He also asserted that he was not an attorney, had no prior involvement with the Board, and had received no instructions from the AJ regarding how to file a motion for waiver of time limits or how to find applicable regulations. *Id.*

ANALYSIS

The Board will waive the 35-day time limit for filing a petition for review only upon a showing of good cause for the delay. 5 C.F.R. § 1201.114(f). In addition, the appellant must show good cause for not seeking an extension in advance of the filing date. 5 C.F.R. § 1201.114(e)-(f). *See Martin v. Defense Logistics Agency*, 39 M.S.P.R. 324, 325 (1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (Table).

To establish good cause, a party must show that he exercised 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). Factors which the Board considers in determining whether good cause has been shown include: whether the appellant was notified, or otherwise aware, of the filing time requirement; the length of the delay; and, the existence of circumstances beyond the appellant's control which caused or contributed to the late filing. *Id.* An appellant's pro se status will also be taken into account. *See Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1582 (Fed. Cir. 1994).

The appellant contends that he filed his petition for review late in order to determine whether the agency's actions between the date the petition was due and the date it was actually filed would help substantiate his claim that his reassignment would result in a reduction in pay. More specifically, the appellant asserts that he was waiting for the agency to post the holiday work schedule so that, if he was not scheduled to work, he could show that his hours worked, and ultimately his pay, have been reduced.

The Board has repeatedly held that an appellant's efforts to gather information to support his claim are not sufficient to establish good cause for the waiver of the deadline for filing a petition for review. *See e.g., Criddell v. United States Postal Service*, 60 M.S.P.R. 30, 33 (1993); *Baugh v. Office of Personnel Management*, 49 M.S.P.R. 58, 62 (1991); *Martin*, 39 M.S.P.R. at 326; *Hines v. Tennessee Valley Authority*, 4 M.S.P.R. 441, 442 (1980); *Sanchez v. Department of the Air Force*, 3 M.S.P.R. 10, 11 (1980). In *Smith v. Office of Personnel Management*, 68 M.S.P.R. 580, 582 (1995), the Board did, however, waive the filing deadline where the delay was minimal, the appellant was pro se, and the delay was caused by the appellant's pursuit of information to support his claim. The instant case, however, presents a very different

¹ The Clerk also advised the appellant that the petition for review did not meet the **Board's requirements because it was not served on the other parties, as required by 5 C.F.R. § 1201.114(h). The Clerk excused this error and served the other parties with a copy of the petition.** PFR File, Tab 2.

set of circumstances. In *Smith*, the appellant was appealing the denial by OPM of an application for retirement benefits based on both military and Federal service. 68 M.S.P.R. at 581. Smith's Board appeal was late because he was seeking help in filing it from an employee at his former employing agency, was attempting to obtain his military records from an Air Force Base, and was in the process of obtaining advice from his congressman. The Board found that appellant Smith had acted diligently. *Id.* at 582.

In this case, however, the appellant did not even use the information regarding his lack of opportunity to work the September 2, 1996 holiday (Labor Day) in support of his petition for review, although he subsequently claimed that obtaining that information caused his petition to be late. See PFR File, Tabs 1, 3. Indeed, he alleged in his petition for review only that he was denied holiday pay in May 1996. Thus, unlike the information sought by Smith (military records used to prove entitlement to certain retirement benefits), the September holiday pay information for which the appellant alleges he was waiting, and which made his petition late, was cumulative, was not essential to his petition, and was not used.² Further, the appellant did not request an extension of the filing deadline from the Board, and did not sufficiently address this failure in his motion to waive the time limit. *Martin*, 39 M.S.P.R. at 326.

Although the appellant's delay in filing was minimal (two days), and he was not represented by an attorney³, these factors are outweighed by his failure to exercise due diligence and ordinary prudence under the circumstances. *Criddell*, 60 M.S.P.R. at 33. The appellant argues that, because the initial decision did not inform him how to file a motion for extension of time, or how to find applicable regulations, waiver of the filing deadline is appropriate. PFR File, Tab 3. Board regulations and procedures do not require that the initial decision provide the appellant with instructions on how to file a motion for a waiver of time limits or where to find regulations covering waiver of time limits. See 5 C.F.R. § 1201.111. The appellant could have contacted the Board for an explanation of the initial decision or an extension of time in which to file the petition. *Caldwell v. Department of the Interior*, 58 M.S.P.R. 54, 57 (1993). There is no evidence in the record indicating that he attempted to do so. *Id.*

An appellant's confusion and lack of sophistication, which contribute to a late filing, may be taken into account when determining whether good cause for the late filing exists. *Walls*, 29 F.3d at 1583. However, the appellant must show that such confusion is related to a specific ambiguity in either the instructions he received or in a Board procedure. See *id.* (petitioner's misinterpretation of agency's instructions that appeal must be filed "within 20 days" was understandable because instructions were sufficiently ambiguous as to constitute inadequate notice); *Boulware v. Office of*

² If the appellant had filed a timely petition and wanted to supplement it with the information acquired pertaining to the September holiday pay denial, he could have done so under 5 C.F.R. § 1201.114(i).

³ In his appeal, the appellant had designated Thomas Tankersley as his representative; it is unclear whether Mr. Tankersley was still involved at the petition for review stage, although the appellant did place Mr. Tankersley on the Certificate of Service to the Motion to Accept Filing as Timely or to Waive Time Limit. PFR File, Tab 3.

Personnel Management, 70 M.S.P.R. 136, 139 (1996) (where OPM's notice of appeal rights was unclear, and appellant misunderstood them, it was appropriate for the Board to exercise discretion to waive the time limit). See also *Brown v. Department of the Navy*, 71 M.S.P.R. 15, 18-19 (1996) (appellant's failure to claim confusion caused by instructions or Board procedures undermines her claim that good cause existed for untimely filing of petition for appeal). Here, there is no alleged ambiguity, as the appellant does not allege that the initial decision failed to provide him with the exact date on which it would become final unless a petition for review has been filed. ID at 3.

The appellant's alleged confusion relates only to the filing of a motion for an extension of time within which to file his petition for review. Ordinary prudence would dictate that the appellant should have informed the Board as soon as possible, certainly in his petition for review, of the reasons for its late filing and that he did not know how to request an extension of time. The appellant did not do so. Moreover, even if we accept the appellant's alleged confusion as a valid reason for the failure to request an extension, it does not support a claim of good cause for delay in the filing of the petition itself, particularly in light of the fact that the information the appellant was waiting for was not used in the petition for review.

Accordingly, the Board finds that the appellant has failed to show good cause for a waiver of the filing deadline, and we therefore DISMISS the petition for review as untimely filed.

ORDER

This is the final order 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 with regard to the merits of the appeal. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

