

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

**2007 MSPB 147**

---

Docket No. PH-0752-04-0067-I-2

---

**Michael L. Helmstetter,  
Appellant,**

**v.**

**Department of Homeland Security,  
Agency.**

June 7, 2007

---

Don Benter, Esquire, Owings Mills, Maryland, for the appellant.

Linda B. Dorsey, Esquire, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant filed a petition for review of a June 21, 2004 initial decision that affirmed the agency's removal action. For the reasons set forth below, we DISMISS the petition for review as untimely filed without a showing of good cause for the delay. 5 C.F.R. § 1201.114(d).

**BACKGROUND**

¶2 The appellant was a WG-3414-12 Machinist with the Coast Guard in Baltimore, Maryland. Initial Appeal File (IAF), Tab 7, subtab 4B. As a result of information provided by a former employee in the machine shop in which the

appellant worked, the agency conducted an investigation into possible illegal drug use by the appellant and 5 of his co-workers while on duty. *Id.*, subtab 4G at 3, 18. The appellant was interviewed by the Coast Guard Investigative Service while at his home and he thereafter provided 2 sworn statements admitting his unlawful use of the controlled substance Oxycontin, and his wife provided similar sworn information. *Id.*, subtabs 4G, 4H at 48-51, 52-53.

¶3 The agency issued a July 3, 2003 notice of proposed removal based on 2 charges: 1) “Illegal use of prescription drugs while on duty”; and 2) “Improper Conduct.” IAF, Tab 7, subtab 4K. The specifications to the first charge alleged the appellant’s improper use of Oxycontin while on duty and the specifications to the second charge alleged that the appellant had provided Oxycontin, Zanax, Percocet, and Valium to a co-worker. *Id.* The appellant provided written and oral responses to the proposal notice. *Id.*, subtabs 4C-4D. The agency issued an October 7, 2003 decision notice finding that the evidence supported both of the charges, that there was a nexus between the appellant’s misconduct and the efficiency of the service and, considering the relevant penalty determination factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), that the removal penalty was appropriate under the totality of the circumstances. *Id.* The appellant was removed effective October 12, 2003. *Id.*, subtabs 4B-4C.

¶4 The appellant’s union filed appeals on behalf of the appellant and his 5 co-workers, who were also removed. IAF, Tab 1. The agency filed a response in opposition and a copy of its file. IAF, Tab 7. The agency’s response included a motion to consolidate all 6 appeals. *Id.*, subtab 1. The union objected to the consolidation on the appellant’s behalf. IAF, Tab 7, subtab 1 at 3-4. The administrative judge (AJ) consolidated all six appeals over the appellant’s objection. *Donald C. Morse, et al., v. Department of Homeland Security*, MSPB Docket No. PH-0752-04-0056-I-1, Lead Case File (LCF); Tabs 8, 10. The

appellant and 4 of his former co-workers then obtained the services of Fredric M. Brandes, Esquire. LCF, Tab 18. To accommodate scheduling problems, the AJ dismissed the appeals without prejudice to the automatic refiling of the appeals 40 days later. LCF, Tab 45.

¶5 The appellant's consolidated appeal was refiled on March 12, 2004. *Donald C. Morse, et al. v. Department of Homeland Security*, MSPB Docket No. PH-0752-04-0056-I-2, Refiled Lead Case File; Tab 1. In the initial decision following the consolidated hearing on the merits of the agency's removal actions, the AJ found that the agency proved both of its charges against the appellant by preponderant evidence. Initial Decision (ID) at 4-14. The AJ rejected the appellant's assertion that his sworn admissions of his misconduct were inadmissible due to the agency's alleged violation of his constitutional rights, because the objective evidence demonstrated that his statements were not obtained through custodial interrogation. ID at 14-22.

¶6 The AJ found that there is a nexus between the appellant's proven misconduct and the efficiency of the service. ID at 22. The AJ found that the appellant failed to prove his affirmative defense of disability discrimination by preponderant evidence, because he failed to present any evidence showing that he was either: 1) substantially limited in a major life activity due to a physical or mental impairment; 2) he had a record of such a limitation; or 3) the agency regarded him as having such a limitation. ID at 23. The AJ found that the deciding official properly considered in the removal decision the relevant *Douglas* penalty determination factors and the AJ determined that the removal penalty was within the tolerable bounds of reasonableness given the seriousness of the appellant's proven misconduct. ID at 23-24. Accordingly, the AJ sustained the agency's removal action. ID at 2, 25. The June 24, 2004 initial decision informed the appellant that it would become the final decision of the

Board on July 26, 2004, unless a petition for review were filed by that date or the Board reopened the appeal on its own motion. ID at 25.

¶7 The appellant, through a new attorney, filed an apparently untimely petition for review on February 19, 2007. Petition For Review File (PFRF), Tab 1. The Clerk of the Board informed the appellant that his petition for review appeared to be untimely, because it should have been filed on or before July 26, 2004, and that the Board's regulations required untimely filed petitions to be accompanied by a motion to accept the petition as timely filed and/or to waive the filing time limit for good cause, and an affidavit or sworn statement setting forth good cause for the untimely filing. PFRF, Tab 2. The Clerk enclosed a copy of the Board's "Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit," and ordered the appellant to file his motion and an affidavit or sworn statement setting forth good cause for the untimely filing on or before March 14, 2007. *Id.* The appellant filed a motion to waive the filing time limit on March 9, 2007. PFRF, Tab 3. The agency did not file a response to the petition for review.

#### ANALYSIS

¶8 A petition for review must generally be filed within 35 days after the date of the issuance of the initial decision, or, if the appellant shows that the initial decision was received more than 5 days after the initial decision was issued, within 30 days after the date the appellant received the initial decision. 5 C.F.R. § 1201.114(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the untimely filing of a petition, 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).

¶9 The appellant admits in his motion to waive the filing time limit that he received the initial decision on June 25, 2004. PFRF, Tab 3 at 4. Thus, the appellant's petition for review should have been filed on or before July 26, 2004, as he was correctly informed in the initial decision, and his instant petition was untimely filed by approximately two and one-half years. 5 C.F.R. § 1201.114(d). The Board has declined to find good cause for a waiver of the filing time limit where, as here, the initial decision clearly notified the appellant of the correct time limit for filing a petition for review. *See Valdez v. Office of Personnel Management*, 103 M.S.P.R. 88, ¶ 7 (2006).

¶10 We also find that the appellant has not established that his delayed filing was due to circumstances beyond his control. The appellant asserts:

I asked my representative, Fredrick M. Brandes, to file an appeal and he did not do so, even though I paid him. Mr. Brandes represented five co-defendant's including myself, even though I should have been treated differently since I was a whistle blower. Mr. Brandes was prosecuted by the Attorney Grievance Commission in my case, and subsequently disbarred on August 16, 2005. I did not find out until recently that I could still file an appeal.

PFRF, Tab 1 at 4. The appellant has attached to his motion a June 26, 2006 \$453,867.36 civil judgment in the appellant's favor and against Mr. Brandes from the Circuit Court in and for Baltimore City, Maryland, and an August 16, 2005 Order of the Maryland Court of Appeals disbaring Mr. Brandes. PFRF, Tab 3, attachments.

¶11 First, the appellant's apparent argument regarding the merits of an alleged whistleblower affirmative defense to the agency's removal action is not relevant to the issue of the timeliness of his petition for review in this case. *See, e.g., Coles v. Department of the Army*, 85 M.S.P.R. 571, ¶ 5 (2000) (the appellant's arguments regarding the merits of the underlying action are not relevant to the timeliness issue); *Marasco v. U.S. Postal Service*, 66 M.S.P.R. 555, 558 (1995) (The appellant's arguments on the merits are not relevant to the untimeliness of his petition for review). Second, regardless of whether the appellant believed that his attorney would file the petition for review on his behalf, the appellant remained personally responsible for the prosecution of his petition. *Belcher v. U.S. Postal Service*, 101 M.S.P.R. 58, ¶ 7 (2006). The appellant is responsible for the errors of his chosen representative except where he has proven that his diligent efforts to prosecute an appeal were thwarted, without his knowledge, by his attorney's deceptions and negligence. *Id.* Although the appellant submitted his own sworn statement, he did not submit any corroborating evidence or show that he tried to contact his attorney before the filing deadline or otherwise made any effort to ensure that his petition would be timely filed. *Id.* Indeed, even if the appellant had shown that his efforts to diligently prosecute his appeal had been thwarted, without his knowledge, by his attorney's negligence, we would not waive the filing deadline now, several years after his submissions show that he should have become aware of that negligence. Under these circumstances, we find that the appellant did not make diligent and repeated efforts to monitor the progress of his appeal, and that he has not established sufficient grounds to overcome the well-established rule that an appellant is responsible for the mistakes of his chosen representative. *Id.*

¶12 Accordingly, we dismiss the appellant's petition for review as untimely filed with no good cause shown for the filing delay.

ORDER

¶13 This is the final order of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision remains the final decision of the Board with regard to the merits of the 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:

---

Matthew D. Shannon  
Acting Clerk of the Board  
Washington, D.C.