

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

2009 MSPB 11

Docket No. PH-0752-05-0403-C-4

Bohdan Senyszyn,

Appellant,

v.

Department of the Treasury,

Agency.

February 10, 2009

Bohdan Senyszyn, Brooklyn, New York, pro se.

Laurence T. Emert, Esquire, New York, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the August 29, 2008 compliance initial decision (CID) that denied his petition for enforcement (PFE). For the reasons discussed below, we find that the PFR does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), however, and AFFIRM the CID as MODIFIED by this Opinion and Order, still DENYING the PFE.

BACKGROUND

¶2 On July 20, 2008, the appellant filed a PFE in which he asserted that the Board's June 25, 2008 Final Order in *Senyszyn v. Department of the Treasury*, [109 M.S.P.R. 604](#) (2008) (Table), entitled him to back pay for the period of October 9 through December 21, 2007, and that the agency had not paid him.* Compliance File (CF), Tab 1. In an August 4, 2008 Acknowledgment Order, the administrative judge (AJ) ordered the agency to respond to the PFE and notified the appellant that he could reply to the agency's response. *Id.*, Tab 2. The agency timely responded to the AJ's order in a submission dated August 19, 2008, that was received by the regional office on the same day. *Id.*, Tab 3. The AJ issued his CID denying the appellant's PFE on August 29, 2008. *Id.*, Tab 4. On September 3, 2008, he issued an order rejecting the appellant's reply to the agency's response, stating that the reply "was received by this office on September 2, 2008, after the issuance of the initial decision in this appeal." *Id.*, Tab 5.

¶3 The appellant has filed a PFR of the CID. PFR File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

* On August 20, 2008, the appellant filed a request for judicial review of *Senyszyn*, [109 M.S.P.R. 604](#), with the U.S. Court of Appeals for the Federal Circuit. *See Senyszyn v. Department of the Treasury*, MSPB Docket No. PH-0752-05-0403-L-3. The current compliance appeal, however, involves an addendum proceeding, and the Board will not usually consider new evidence and arguments regarding the merits of a case during a compliance proceeding. *See, e.g., Henry v. Department of Veterans Affairs*, [108 M.S.P.R. 458](#), ¶ 13 (2008); *Ben Espinoza v. Department of the Navy*, [69 M.S.P.R. 679](#), 683, *review dismissed*, [86 F.3d 1174](#) (Fed. Cir. 1996). Therefore, the appellant's filing of a request for judicial review did not divest the Board of jurisdiction over this appeal. *Cf. Matthews v. Social Security Administration*, [104 M.S.P.R. 130](#), ¶¶ 7-10 (2006) (holding that the Board had jurisdiction over Matthews' motion for attorney fees based on a Board final decision, even though she had a pending action in court on the matters raised in her Board appeal, because a request for attorney fees is decided in an addendum proceeding in which the Board does not reconsider the merits of its final decision in the underlying appeal).

ANALYSIS

The appellant's PFR does not provide a basis for Board review.

¶4 We grant PFRs such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the AJ made an error interpreting a law or regulation. The regulation that establishes this standard of review is found at [5 C.F.R. § 1201.115](#). After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the AJ made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we deny the PFR. *See, e.g., Petric v. Office of Personnel Management*, [108 M.S.P.R. 342](#), ¶ 5 (2008).

The appellant's reply to the agency's response does not warrant a different outcome in this case.

¶5 The appellant asserts, inter alia, that the AJ erred in issuing a premature CID without considering his timely reply to the agency's response. He contends that he was deprived of the right to be heard. PFR at 3-4.

¶6 The Board has long recognized that it is error for an AJ to issue an order or ID prior to the expiration of the time allowed for a party's response. *Phillips v. Department of the Air Force*, [104 M.S.P.R. 229](#), ¶ 4 (2006); *Crumpton v. Department of the Treasury*, [98 M.S.P.R. 115](#), ¶ 8 (2004); *Edeburn v. U.S. Postal Service*, [95 M.S.P.R. 486](#), ¶ 7 (2004). Where such a procedural error appears, the Board will determine whether the affected party's substantive rights were harmed. The proponent of the alleged error bears the burden of demonstrating that the error adversely affected those rights. Absent an adverse effect on substantive rights, the error is harmless and of no legal consequence. *Crumpton*, [98 M.S.P.R. 115](#), ¶ 8 (2004); *Edeburn*, [95 M.S.P.R. 486](#), ¶ 7.

¶7 In this case, the deadlines set forth in the AJ's Acknowledgment Order could be considered inconsistent or confusing. On the one hand, the AJ stated that "[t]he record will close 10 calendar days from the date of service of the agency's reply to appellant's petition." CF, Tab 2, Acknowledgment Order at 2.

Because the date of service of the agency's reply was August 19, 2008, it could be argued that the AJ did not err in issuing the CID on August 29, 2008. *See, e.g., Blackmer v. Department of the Navy*, [52 M.S.P.R. 571](#), 574 (1992). On the other hand, though, the AJ notified the appellant that he could "file a response to the agency's written submission no later than 10 calendar days from the date of service of the agency's submission." CF, Tab 2, Acknowledgment Order at 2. The "date of service" by mail under the Board's regulations is determined by the postmark date. *See Bloomer v. Department of Health & Human Services*, [966 F.2d 1436](#), 1438 (Fed. Cir. 1992); *Gebhardt v. Department of the Air Force*, [99 M.S.P.R. 49](#), ¶ 7 (2005), *aff'd*, 180 F. App'x 951 (Fed. Cir. 2006); [5 C.F.R. § 1201.4\(i\)](#), (j). Here, the appellant's reply to the agency's response was postmarked August 28, 2008, i.e., 1 day before the record closed. CF, Tab 5. Therefore, because the AJ may have issued his CID before the deadline set forth in the Acknowledgment Order and did not consider the appellant's reply, we have considered it on review. *See, e.g., Phillips*, [104 M.S.P.R. 229](#), ¶ 4; *Crumpton*, [98 M.S.P.R. 115](#), ¶ 9.

¶8 We find that the appellant's reply to the agency's response does not affect the disposition of this case. The appellant simply reiterated his argument that the Board's Final Order in *Senyszyn*, [109 M.S.P.R. 604](#), entitled him to back pay for the period of October 9 through December 21, 2007, and that the agency had not paid him. CF, Tab 5 at 3. The appellant has shown no error in the AJ's determination that nothing in that order "could even remotely be construed as a directive to the agency to provide any monetary relief, or any other relief for that matter, to the appellant," and thus, that "the appellant has not established that the agency is in noncompliance with the Board's final decision." CID at 4. Therefore, while the AJ may have denied the appellant's PFE prematurely, any error did not harm the appellant's substantive rights, and, thus, is of no legal consequence. *See Phillips*, [104 M.S.P.R. 229](#), ¶ 6; *Edeburn*, [95 M.S.P.R. 486](#), ¶ 9.

ORDER

¶9 This is the final decision of the Merit Systems Protection 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, 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:

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