UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 77

Docket No. DE-315H-08-0402-I-1

Robert I. Terry,

Appellant,

v.

Equal Employment Opportunity Commission,

Agency.

May 11, 2009

Robert I. Terry, Albuquerque, New Mexico, pro se.

Stan Pietrusiak, 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 the August 6, 2008 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we DISMISS the petition for review as untimely filed without a showing of good cause for the delay in filing.

BACKGROUND

¶2 Effective January 15, 2008, the agency terminated the appellant from his Investigator position during his probationary period based on alleged post-appointment reasons. Initial Appeal File (IAF), Tab 10 at 7-8. The appellant appealed the termination and requested a hearing. IAF, Tab 1 at 1-3. In an

August 6, 2008 initial decision, the administrative judge dismissed the appeal for lack of jurisdiction without a hearing, finding that the appellant failed to raise a nonfrivolous allegation that his termination was for pre-appointment reasons, or based on marital status discrimination or partisan political reasons. IAF, Tab 11, Initial Decision (ID), at 3-4. The initial decision informed the parties that it would become the final decision of the Board on September 10, 2008, unless a petition for review were filed by that date. ID at 4.

¶3 On February 8, 2009, the appellant filed an appeal form in the Denver Field Office, which the field office forwarded to the Board's headquarters for docketing as a petition for review of the instant appeal.[1] Petition for Review File (PFRF), Tabs 1-3. The appeal form did not address either the jurisdictional issue decided by the administrative judge or the apparent untimeliness of the filing. PFRF, Tab 1. Rather, the appellant raised various allegations of procedural error with regard to his termination, contested the agency's assessment of his job performance, and alleged that his termination violated veterans' preference laws. *Id*. at 5, 8-10, 12, 14.

¶4 The Clerk of the Board informed the appellant that his petition for review in this termination appeal appeared to be untimely because it should have been filed on or before September 10, 2008, and that the Board's regulations require untimely-filed petitions for review to be accompanied by a motion to accept the petition as timely filed or to waive the filing time limit for good cause. PFRF, Tab 3. The Clerk informed the appellant about how to file such a motion with a supporting affidavit or sworn statement. *Id*.

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[1] The field office also docketed the appeal form as a new Veterans Employment Opportunities Act of 1998 appeal, *Terry v. Equal Employment Opportunity Commission*, Docket No. DE-3330-09-0180-I-1, Tab 1, and forwarded it to headquarters for docketing in the petition for review file in the appellant's Uniformed Services Employment and Reemployment Rights Act of 1994 appeal, *Terry v. Equal Employment Opportunity Commission*, Docket No. DE-4324-08-0383-I-1, Petition for Review File, Tab 3.

¶5 The appellant filed a motion to accept his filing as timely or to waive the time limit, claiming that his appeal form identifies newly-discovered issues, which have not been adjudicated, and for which he has not been afforded a hearing. PFRF, Tab 4 at 3, Tab 7 at 2, 5. He urges the Board to construe his appeal form as "a new complaint, separate and distinct from [his] previous complaint," rather than as an untimely petition for review of this termination appeal. PFRF, Tab 4 at 3, Tab 7 at 2-3. He argues that his new appeal would be timely because the appeal form should have been docketed as a timely mixed-case appeal of a formal equal employment opportunity (EEO) complaint that has been pending before the agency for more than 120 days. PFRF, Tab 7 at 2-5. He alleges that his EEO complaint was based on allegations of race and sex discrimination. *Id*. at 3. The agency asserts that the petition for review should be dismissed as untimely, PFRF, Tab 8 at 7-8, Tab 10 at 12-13, and that the petition fails to meet the Board's review criteria, PFRF, Tab 8 at 8-10, Tab 10 at 13-14.

ANALYSIS

¶6 A petition for review must be filed within 35 days after the administrative judge issued the initial decision, or if the decision was received more than 5 days after the date of issuance, within 30 days after the date of receipt. *Garside v. Office of Personnel Management*, 109 M.S.P.R. 65, ¶ 5 (2008); 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. *Olivares v. Merit Systems Protection Board*, 17 F.3d 386, 388 (Fed. Cir. 1994); *Garside*, 109 M.S.P.R. 65, ¶ 5; 5 C.F.R. §§ 1201.12, .114(f).

¶7 We find that the appellant filed his petition for review 151 days beyond the September 10, 2008 filing deadline, which is a substantial delay. *See Carriker v. Office of Personnel Management*, 106 M.S.P.R. 516, ¶ 7 (2007) (the Board considered the appellant's 5-month delay in filing her petition for review as a factor weighing against waiving the filing deadline); *see also Alexander v.*

Department of Veterans Affairs, 90 M.S.P.R. 591, ¶ 5 (2002) (the Board treats a submission mistakenly directed to a field office as a petition for review filed on the date it was filed with the field office).

¶8 To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *E.g.*, *Minnich v. Office of Personnel Management*, 63 M.S.P.R. 573, 574 (1994), *aff'd*, 53 F.3d 348 (Fed. Cir. 1995) (Table). The discovery of new evidence may constitute good cause for waiver of the Board's filing deadline if the evidence was not readily available before the close of the record below, and is of sufficient weight to warrant an outcome different from that of the initial decision. *See id*. at 575. Here, we find that the appellant has failed to show good cause for the Board to waive the time limit for filing a petition for review. His sole explanation for the petition for review's untimeliness is that it pertains to harmful errors that the agency committed, and that he "could not, reasonably, have known" of these errors at the time of the hearing. PFRF, Tab 7 at 2. This conclusory assertion is insufficient to establish that the alleged new evidence was previously unavailable despite the appellant's due diligence. This is especially so because it appears that the appellant could have obtained this information through discovery in the instant appeal, since he alleges that he obtained it through discovery in his EEO complaint. *Id*.; *see Kennedy v. Department of Defense*, 100 M.S.P.R. 308, ¶ 10 (2005) (the Board declined to waive the filing deadline where the appellant failed to explain why her allegedly new evidence was previously unavailable). Furthermore, the appellant has not explained how this alleged new evidence would warrant a different outcome than that in the initial decision. *See Edwards v. Department of the Army*, 63 M.S.P.R. 680, 683 (1994), *overruled on other grounds by Lacy v. Department of the Navy*, 78 M.S.P.R. 434 (1998).

¶9 Accordingly, we DISMISS the petition for review as untimely filed with no good cause shown for the 151-day delay. [2]

ORDER

¶10 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 with regard to the dismissal of the appeal for lack of jurisdiction. 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

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[2] We decline to grant the appellant's request that the appeal form be docketed as a new appeal regarding his harmful error claims. The appellant has not created a new appeal separate and distinct from the instant appeal of his termination by raising new harmful error affirmative defenses. These affirmative defenses pertain to the underlying termination action and cannot be separately appealed to the Board. *See Moon v. Department of the Army*, 63 M.S.P.R. 412, 420 (1994) (claims of harmful error are not appealable to the Board absent an otherwise appealable action). To the extent that the appellant's claims are pertinent to the resolution of his other Board appeals, we note that his February 8, 2009 submission has already been docketed for consideration in *Terry v. Equal Employment Opportunity Commission*, Docket No. DE-3330-09-0180-I-1, and *Terry v. Equal Employment Opportunity Commission*, Docket No. DE-4324-08-0383-I-1.

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:

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