UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 79

Docket No. SF-0752-06-0155-C-2

Sabinus I. Njoku,

Appellant,

v.

Department of Homeland Security,

Agency.

May 13, 2009

Sabinus I. Njoku, Sacramento, California, pro se.

Richard N. Reback, 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 filed a petition for review (PFR) pursuant to a decision of the Board's administrative judge (AJ) denying his petition for enforcement of a settlement agreement reached during an appeal of his removal. For the reasons set forth herein, we DISMISS the PFR as untimely filed by over three months without a showing of good cause for the delay.

BACKGROUND

¶2 The appellant appealed the agency's action removing him from the position of Auditor, GS-0511-12, in the agency's Office of Inspector General, effective November 26, 2005. On February 24, 2006, the parties mutually resolved all

disputed items under a written settlement agreement. Initial Appeal File (IAF), Tab 17. By its terms, the appellant resigned, and the agency removed the SF-50 documenting his removal and replaced it with a document showing his voluntary resignation. *Id.* Additionally, the agreement included a statement regarding the agency's handling of any future inquiries made pursuant to federal background investigations and general employment-related inquiries. *Id.* The agency agreed to pay the appellant a lump sum of $6,000. *Id.* Pursuant to the agreement, the appellant moved to withdraw the appeal. Initial Decision (ID) at 2. The AJ found that the appeal is within the Board's jurisdiction, the settlement was lawfully and freely reached, and the parties acknowledged that they fully understood its terms. ID at 1-2. The AJ incorporated the agreement into the record for enforcement purposes and dismissed the appeal as settled on February 24, 2006. *Id.*

¶3 The appellant filed a petition for enforcement (PFE) of the settlement agreement on April 5, 2006. Compliance File (CF) (C-1), Tab 1. On April 24, 2006, he advised the AJ that he wished to withdraw that petition, explaining that he had received payment of all settlement monies and a corrected SF-50 from the agency.[1] CF (C-1), Compact Disc (CD). The AJ granted the motion to withdraw the PFE and dismissed it. Compliance ID (CID) (C-1) at 2.

¶4 The appellant filed a second PFE on March 7, 2008. CF (C-2), Tab 1. He averred that the agency had violated sections 2(c) and (d) of the settlement agreement, which pertained to the agency's handling of inquiries related to federal background investigations and employment. *Id.* The AJ found that the appellant failed to show by preponderant evidence that the agency had materially breached the settlement agreement and issued an August 15, 2008 CID that

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[1] The agency submitted proof that it had fulfilled these terms of the agreement when it filed a motion to dismiss. *See* CF (C-1), Tab 1.

denied the second PFE. CID (C-2) at 1, 5-6. The CID became final on September 19, 2008. *Id.* at 7.

¶5 On December 23, 2008, the appellant filed a PFR by facsimile. PFR File (PFRF), Tab 1. Since the finality date of the CID that denied the PFE was September 19, 2008, the Clerk supplied the appellant with a "Motion to Accept Filing as Timely or to Waive Time Limit" form to show good cause for the untimely filing. PFRF, Tab 2. The appellant filed a completed copy of this motion. PFRF, Tab 6. The agency has not filed a response.

ANALYSIS

¶6 "Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner 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, .114(f). To establish good cause, a party must show that she 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). The appellant bears the burden of proof on the issue of timeliness. *Small v. General Services Administration*, 88 M.S.P.R. 187, ¶ 3 (citing 5 C.F.R. § 1201.56(a)(2)(ii)), *aff'd*

sub nom. Picciolo v. Merit Systems Protection Board, 25 F. App'x 972 (Fed. Cir. 2001).

¶7 Here, the CID became final on September 19, 2008, and the PFR was filed on December 23, 2008, over three months after the finality date. The appellant has not claimed that he did not receive the CID or that he received it more than five days after the date of issuance. Thus, the PFR is clearly untimely. The appellant's cover memorandum submitted with the PFR states that he had "previously faxed this request in September" and "followed it up with a call a couple of weeks later and was told it was not in the system . . . and that [he] should give it some time." PFRF, Tab 1 at 1. Beyond his vague assertions in the memorandum, the appellant has not provided *any* proof of his alleged efforts to file this PFR in September. Acceptable proof might have included a facsimile machine transaction report showing that he sent the transmission to the Board, or notes from a telephone call identifying the person with whom he claims to have spoken. *See, e.g.*, *Duran-Arcelay v. Office of Personnel Management*, 70 M.S.P.R. 13, 16 (1996) (a party must present specific details concerning transmission of the facsimile such as the time or date the submission was allegedly faxed and a copy of the petition for review that was allegedly faxed); *Biter v. Interstate Commerce Commission*, 76 M.S.P.R. 82, 86-87 (1997) ("if . . . a party can show by credible, unrebutted evidence that a facsimile was actually transmitted on a date other than the machine-generated date shown on the facsimile, the machine-generated date will not govern"). Further, the appellant's assertions in his memorandum are not accompanied by an affidavit or sworn statement. *See Vargo v. U.S. Postal Service*, 78 M.S.P.R. 66, 70 (1998); 5 C.F.R. § 1201.114(f). Moreover, in his subsequent timeliness motion supported by an

affidavit, the appellant does not assert *any* cause for the delay in filing the PFR of the CID.[2] *See* PFRF, Tab 6.

¶8 Accordingly, we find that the appellant has not met his burden of proof and we DISMISS the PFR as untimely filed without a showing of good cause for the delay.

ORDER

¶9 This is the final order of the Merit Systems Protection Board concerning the timeliness of the petition for review of the compliance initial decision. The compliance initial decision will remain the final decision of the Board regarding the denial of the petition for enforcement. Title 5 of the Code of Federal Regulations, section 1201.113 (5 C.F.R. § 1201.113).

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

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[2] The motion instead pertains to the appellant's untimely, concurrently-filed PFR of the ID that dismissed as settled the appellant's original appeal of his removal. PFRF, Tab 6; *see Njoku v. Department of Homeland Security*, 2009 MSPB 78, ¶ 7.

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.