UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 78

Docket No. SF-0752-06-0155-I-1

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) of an initial decision (ID) of the Board's administrative judge (AJ) dismissing as settled the appeal of his removal. For the reasons set forth herein, we DISMISS the PFR as untimely filed by over two years and eight 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. Initial Appeal File (IAF), Tab 1. On February 24, 2006, the

parties mutually resolved all disputed items under a written settlement agreement. IAF, Tab 17. The appellant thus moved to withdraw his appeal. 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.* The ID became final on March 31, 2006. ID at 2.

¶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 withdrew that petition, explaining that he had received payment of all settlement monies and a corrected SF-50 from the agency, according to the terms of the agreement.[*] CF (C-1), Compact Disc (CD). The AJ granted the motion to withdraw the petition and dismissed it. Compliance ID (CID) (C-1) at 2.

¶4 The appellant filed a second PFE on March 7, 2008, averring that the agency had violated the settlement agreement. CF (C-2), Tab 1. The AJ found that the appellant failed to show by preponderant evidence that the agency had materially breached the agreement and issued an August 15, 2008 CID that 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. His pleading was captioned "Request to [C]ancel Settlement Agreement and [R]eopen [O]riginal Case [R]eferenced [A]bove." *Id.* at 2. The appellant asked the Board to reopen the original removal appeal, review and cancel the settlement agreement because he was "never helped" by the agreement; he claimed that he was was forced to accept the agreement and that the agency "misguided and misinformed" him. *Id.* at 4-5. Because the PFR challenged the

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[*] 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.

validity of the settlement agreement itself, the Clerk's office found that it applied to both the compliance matter and the original appeal. PFRF, Tab 3. Noting that the finality date of the ID that dismissed the original appeal as settled was March 31, 2006, 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. *Id.* The appellant filed a completed copy of this form. 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). 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 ID became final on March 31, 2006, and the PFR was received over two years and eight months later on December 23, 2008. The PFR is clearly untimely. As for a showing of good cause, the appellant has not asserted that he failed to receive the ID or that he filed any PFR based on the ID prior to the finality date. Instead, he has contended under penalty of perjury that the ID "was not finalized and prehearing date was cancelled, and settlement agreement did not include or inform of the right to request Board's review of settlement agreement within a specified time frame." PFRF, Tab 6 at 2. The record shows, however,

that the ID contains the Board's standard notices to appellants, including the finality date and the procedures for obtaining Board review, judicial review, and enforcement. ID at 2-5. An appellant's unfamiliarity with legal matters and Board procedures and his failure to follow the explicit filing instructions in the ID do not constitute good cause for a delay. *Brum v. Department of Veterans Affairs*, 109 M.S.P.R. 129, ¶ 6 (2008). The appellant has failed to meet his burden of proof, and accordingly, we DISMISS the PFR as untimely filed without a showing of good cause for the delay.

ORDER

¶8 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 dismissal of the appeal as settled. 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 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.