UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 91

Docket No. SF-3443-05-0820-I-1
SF-0752-05-0821-I-1

Ronald Smith,

Appellant,

v.

United States Postal Service,

Agency.

June 4, 2009

Ronald Smith, San Francisco, California, pro se.

Corrine H. Lee, Esquire, San Francisco, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed petitions for review (PFRs) of the initial decisions (IDs) issued on August 30, 2005, and November 1, 2005, in his appeals in MSPB Docket Nos. SF-3443-05-0820-I-1 (0820) and SF-0752-05-0821-I-1 (0821). We join these appeals for adjudication pursuant to 5 C.F.R. § 1201.36(a)(2), and DISMISS the appellant's petitions as untimely filed without a showing of good cause for the filing delays.

BACKGROUND

¶2 The appellant filed an appeal on July 21, 2005, challenging his non-selection for an acting supervisor position. 0820 Appeal File, Tab 1. The administrative judge (AJ) issued an Acknowledgment Order informing the appellant that non-selection was not generally a matter within the Board's jurisdiction and directing him to submit evidence and argument to show that there was Board jurisdiction over his appeal. *Id.*, Tab 2. The Order also stated that the appeal appeared to be untimely and directed the appellant to show that it was timely or that there was good cause for any delay. *Id.* The agency subsequently filed a Motion to Dismiss for lack of jurisdiction and untimeliness. 0820 Appeal File, Tab 7. The appellant responded to the Acknowledgment Order and Motion to Dismiss by asserting that the Board had jurisdiction over his appeal because he was disqualified due to a suitability determination under 5 C.F.R. part 731. *Id.*, Tab 8. In a telephone call with the appellant, the AJ explained that Board jurisdiction over such suitability determinations arises only in relation to positions in the competitive service. *Id.*, Tab 12. The appellant subsequently submitted a written request to withdraw his appeal. *Id.*, Tab 10. The AJ issued an ID dismissing the appeal as withdrawn. *Id.*, Tab 12. The ID informed the parties that it would become final on October 4, 2005, unless a PFR was filed by that date. *Id.*

¶3 The appellant filed a second appeal on July 21, 2005, alleging that he was constructively suspended. 0821 Appeal File, Tab 1. The AJ issued an Acknowledgment Order setting forth the criteria for Board jurisdiction over a constructive suspension and directing the appellant to submit evidence and argument to show that there was Board jurisdiction over his appeal. *Id.*, Tab 2. The Order also directed the appellant to show that the appeal was timely or that there was good cause for any delay. *Id.* The agency subsequently filed a Motion to Dismiss for lack of jurisdiction and untimeliness. 0821 Appeal File, Tab 7. The appellant submitted a response in opposition to dismissal. *Id.*, Tab 8. After

obtaining a new representative, he was permitted to make a second response. *Id.*, Tab 13. The AJ issued an ID dismissing the appeal for lack of jurisdiction finding that the appellant failed to make a nonfrivolous allegation of constructive suspension lasting more than 14 days. *Id.*, Tab 14. The AJ made no determination on the issue of the timeliness of the appeal. *Id.* The ID informed the parties that it would become final on December 6, 2005, unless a PFR was filed by that date. *Id.*

¶4 On December 31, 2008, the appellant made submissions regarding both cases to the Office of the Clerk of the Board (OCB). 0820 PFR File, Tab 1; 0821 PFR File, Tab 1. The OCB issued a letter to the appellant in each case stating that it was unclear whether he intended to file a PFR and directing him to clarify if that was his intent. 0820 PFR File, Tab 2; 0821 PFR File, Tab 2. Each letter also informed the appellant that his December 31, 2008 submissions, if PFRs, appeared untimely, having been filed after the finality date of each ID, and that he was required to show there was good cause for his untimeliness. *Id.*

¶5 The appellant made identical submissions in each case, asking that the Board waive the deadline for filing a PFR. 0820 PFR File, Tab 3; 0821 PFR File, Tab 3. In support of his request, he states that, "The agency and the representative had complete control from the beginning and [sic] the end . . . I've only participated in giving the representative all evidence." *Id.* He cites to a union letter of May 3, 2007, stating that it was not representing him in two Board cases (including the 0821 appeal) and to other attached documents regarding the merits of various cases, which he says were submitted to the AJ. *Id.* The appellant also states that he did not request an extension of time prior to the deadline for filing a PFR because he was unable to speak up for himself. *Id.* The Board issued an Acknowledgment Order in each case. 0820 PFR File, Tab 4; 0821 PFR File, Tab 4. Neither party made a further submission.

ANALYSIS

¶6 To be timely, a PFR must be filed within 35 days after the AJ issued the ID, or if the appellant shows that the ID was received more than 5 days after the date of issuance, within 30 days after the date of receipt. *Lawson v. Department of Homeland Security*, 102 M.S.P.R. 185, ¶ 5 (2006); 5 C.F.R. § 1201.114(d). The Board will waive the filing time limit only upon a showing of good cause for the delay. *Olivares v. Merit Systems Protection Board*, 17 F.3d 386, 388 (Fed. Cir. 1994); 5 C.F.R. §§ 1201.12, 1201.114(f).

¶7 Here, the appellant does not assert that he received the IDs in these appeals more than 5 days after their issuance. Therefore, he was required to have filed his PFR in his 0820 appeal by October 4, 2005. 0820 Appeal File, Tab 12. He was required to have filed his PFR in his 0821 appeal by December 6, 2005. 0821 Appeal File, Tab 14. The appellant did not file a petition in either appeal until December 31, 2008. 0820 PFR File, Tab 1; 0821 PFR File, Tab 1. In each case, there was more than a 3-year delay, and the PFRs are therefore untimely. The Board considers the length of the delay in every good cause determination. *See Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1582 (Fed. Cir. 1994); *Walker v. Department of the Air Force*, 109 M.S.P.R. 261, ¶ 5 (2008).

¶8 To establish good cause for a delay in filing, 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). In addition to the length of the delay, the Board considers the reasonableness of the appellant's excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune that prevented him from timely filing his petition. *See, e.g., Walls*, 29 F.3d at 1582; *Wyeroski v. Department of Transportation*, 106 M.S.P.R. 7, ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶9 The appellant indicates that his representative was in control of the cases and that he was unable to act on his own. The well-settled rule, as stated in *Sofio v. Internal Revenue Service*, 7 M.S.P.R 667, 670 (1981), is that an appellant is responsible for the error, action or inaction of a chosen representative. A limited exception exists where an appellant has proven that his diligent efforts to prosecute his case were thwarted by the representative's deception and negligence. *Miller v. Department of Homeland Security*, 110 M.S.P.R. 258, ¶ 11 (2008). In this case, the appellant was not represented at the time of the ID in his non-selection case (0820), but had a union representative at the time of the ID in his constructive suspension (0821). The appellant has not asserted or shown that he made diligent efforts to file a timely PFR in the latter case but was prevented by the union representative. Therefore, he is bound by the representative's inaction with regard to a PFR on his constructive suspension (0821).

¶10 With regard to the non-selection case (0820), in which he withdrew his appeal, the appellant has provided no evidence or argument to show there were unavoidable circumstances or matters beyond his control that prevented him from timely filing a PFR. His 3-year delay is significant, and the appellant has not shown that he acted with due diligence or was unable to make a timely filing. The documents that he has provided in his original submission and in response to the Board's request for clarification address a 1992 nonselection, a workers' compensation claim, his disability retirement award and other matters, but do not illuminate the reasons for his delay.

¶11 Accordingly, we find that the appellant has not shown that he timely filed his PFRs in these appeals or that good cause exists for the filing delays. We therefore dismiss the PFRs in both appeals as untimely filed.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petitions for review. The initial decisions will remain the

final decisions of the Board with regard to these appeals. 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.