

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

2009 MSPB 93

Docket No. AT-0752-08-0769-I-1

**Rufus L. Mitchell, Jr.,
Appellant,**

v.

**United States Postal Service,
Agency.**

June 4, 2009

Rufus L. Mitchell, Jr., Decatur, Georgia, pro se.

Randle Smith, Esquire, Atlanta, Georgia, 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 October 20, 2008 initial decision (ID) that sustained the agency's action removing him from his position of Mail Processing Clerk. We DISMISS the appellant's petition as untimely filed without a showing of good cause for the delay.

BACKGROUND

¶2 The agency removed the appellant for failure to be regular in attendance, Initial Appeal File (IAF), Tab 5, Subtabs 4A, 4B, and the appellant timely appealed his removal to the Board, IAF, Tab 1. The administrative judge (AJ) to

whom the appeal was assigned issued an ID in which he sustained the charge and the removal. IAF, Tab 10, ID at 1-6.

¶3 Almost 4 months after the ID was issued, the appellant filed a PFR of that decision. PFR File, Tab 1. In his petition, he alleges that he was wrongfully dismissed and that the agency official who proposed his removal failed to act in good faith in accommodating his need to provide care for his disabled son. *Id.* at 1. The agency has not responded to the appellant's petition.

ANALYSIS

¶4 A PFR must generally be filed within 35 days after the date of the issuance of the ID, or, if the appellant shows that the ID was received more than 5 days after it was issued, within 30 days after the date the appellant received the ID. [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](#), 1201.114(f). To establish good cause for the untimely filing of a petition, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See 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).

¶5 The ID in this case was issued on October 20, 2008, and notified the appellant that it would become final 35 days later, on November 24, 2008, unless the appellant filed a PFR with the Board by that date. ID at 1, 6. The appellant did not file his PFR until February 18, 2009. PFR File, Tab 1. Moreover, he

does not allege that his receipt of the ID was delayed; instead, he acknowledges that his PFR is untimely. *Id.* In a statement signed under penalty of perjury, however, he asks that the Board waive the filing deadline because he was evicted from his home, was trying to secure unemployment benefits, was searching for a place to live, and was overwhelmed by these problems such that he did not know he could request an extension of time. PFR File, Tab 3 at 1-2. With his statement, the appellant submits copies of an eviction order, his lease on his subsequent home, and a decision approving his unemployment insurance claim. *Id.* at 4-5, 9-12. The appellant also asserts in his PFR that his telephone was disconnected and his utilities shut off. PFR File, Tab 1.

¶6 While ensuring a place to live for oneself and one's family are serious matters that could interfere with the timely filing of a petition, the appellant's evidence establishes that these matters were concluded by October 1, 2008, prior to the issuance of the ID on October 20. The copy of the eviction order the appellant has submitted indicates that it was issued in August 2008, and the appellant signed the lease on his subsequent home on October 1, 2008. *See* PFR File, Tab 3 at 9, 11. Therefore, the appellant's eviction and search for a new home appear to have no bearing on the appellant's ability to timely file a PFR during the filing period of October 20 through November 24, 2008. Additionally, the appellant provides no details concerning when his utilities and telephone service were cut off or how this affected his ability to timely file a PFR or an extension of time request.

¶7 The appellant's unemployment insurance claim appears to have been filed on September 29, 2008, while the appellant's Board appeal was pending before the AJ. *See* PFR File, Tab 3 at 4. Although the claim was initially denied on November 4, 2008, *see id.* at 5, which was 15 days after the AJ had issued the ID, the appellant sought reconsideration of the denial and a favorable decision was issued on November 20, 2008, *id.* at 4-5, which was 4 days before the filing deadline for this PFR. We need not determine whether the appellant's pursuit of

his unemployment claim could support a finding of good cause for a delay prior to the issuance of the final decision on that claim. Even if it could, it would be insufficient to show good cause for the appellant's failure to file his PFR until February 18, 2009, nearly 3 months after the unemployment claim had been finally adjudicated. Such a delay is not minimal, but significant. *See Bilbrew v. U.S. Postal Service*, [111 M.S.P.R. 34](#), ¶ 12 (2009) (a filing delay of 2 months is significant); *Vandagriff v. Department of the Army*, [106 M.S.P.R. 446](#), ¶ 10 (2007) (a 3-month delay is not minimal).

¶8 Accordingly, even though he was proceeding pro se, the appellant has not shown that circumstances beyond his control prevented him from filing a timely PFR, or that he has exercised due diligence or ordinary prudence in his stated circumstances. Therefore, we DISMISS his PFR as untimely filed with no showing of good cause for the delay.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision remains the final decision of the Board with regard to the merits of 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.