UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 101

Docket No. DC-3443-08-0727-C-1
DC-3443-08-0727-I-1

David L. Gerdts,

Appellant,

v.

Department of Labor,

Agency.

June 8, 2009

David L. Gerdts, Copperas Cove, Texas, pro se.

Jamila B. Minnicks, 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petitioned for review of both the October 22, 2008 initial decision that dismissed his alleged restoration appeal as withdrawn and the December 9, 2008 compliance initial decision that dismissed his petition for enforcement for lack of jurisdiction. For the reasons discussed below, we DISMISS the appellant's petition for review of the initial decision as untimely filed without good cause shown for the delay in filing. Because the appellant's petition for review of the compliance initial decision does not meet the review

criteria under 5 C.F.R. § 1201.115, we DENY the appellant's petition for review of the compliance initial decision.

BACKGROUND

¶2 The appellant filed an appeal with the Board alleging that the agency failed to properly restore him to duty. Initial Appeal File (IAF), Tab 1 at 3-4. The administrative judge issued a show cause order that informed the appellant that it appeared the Board does not have jurisdiction over his alleged restoration appeal because restoration rights only attach to employees who have recovered from compensable injuries. IAF, Tab 3 at 1-2. The administrative judge also informed the appellant that, even if he was affected by an action appealable to the Board, it appeared that his appeal was untimely filed. *Id*. at 2. The administrative judge informed the appellant of his burden to establish jurisdiction over his appeal and that his appeal was timely filed and the administrative judge instructed the appellant to file evidence and argument on these issues. *Id*. at 2-3. The appellant responded to the administrative judge's show cause order. IAF, Tab 5.

¶3 The agency then submitted a copy of a settlement agreement that it reached with the appellant for the purpose of resolving the appellant's alleged restoration appeal. IAF, Tab 6 at 4. The agreement provided, inter alia, that the appellant would withdraw his appeal in exchange for the agency agreeing to complete and forward forms related to the appellant's application for disability retirement to the Office of Personnel Management (OPM). *Id*. at 2-3.

¶4 Based on the written record, the administrative judge issued an October 22, 2008 initial decision that dismissed the appellant's alleged restoration appeal as withdrawn. IAF, Tab 7, Initial Decision (ID) at 1-2. The administrative judge found that the appellant withdrew his appeal pursuant to the terms of a settlement agreement with the agency, and that the parties submitted a copy of the signed, written agreement as evidence of the appellant's withdrawal of the appeal. ID at

2. The initial decision became final when neither party filed a petition for review prior to November 26, 2008. ID at 2.

¶5 On November 7, 2008, the appellant filed a petition for enforcement that asserted that the agency failed to comply with the terms of the settlement agreement when it failed to submit information to OPM concerning his alleged change to a lower grade position in May 2004. Compliance File (CF), Tab 1 at 2. The administrative judge issued an acknowledgment order that informed the appellant of his burden to prove that the agency breached the settlement agreement and he instructed the parties to file evidence and argument on the compliance issue. CF, Tab 4. In response to the administrative judge's order, the agency asserted that the appellant's petition for enforcement should be denied because it had complied with the terms of the settlement agreement. CF, Tab 7 at 5-8. The appellant did not file any further submissions.

¶6 The administrative judge issued a December 9, 2008 compliance initial decision that dismissed the appellant's petition for enforcement for lack of jurisdiction. CF, Tab 8, Compliance Initial Decision (CID) at 1-2. The administrative judge found that the Board lacks jurisdiction to enforce the settlement agreement because he did not make a finding that the appellant's alleged restoration appeal was within the Board's jurisdiction and the parties did not express any intention in their settlement agreement to have the settlement entered into the record for enforcement purposes. CID at 2.

¶7 On December 17, 2008, the appellant filed a petition for review of the compliance initial decision that asserts that: neither the agency nor the administrative judge ever indicated that an additional "step" was necessary to enter the settlement agreement into the record; and the agency and the administrative judge should be held responsible for ensuring that the settlement agreement was entered into the record. Petition for Review File (PFRF), Tab 1 at 1, 3-4, 6. He further asserts that, had he been asked his preference by the administrative judge, he would have indicated his desire to have the agreement

entered into the record. *Id*. at 3. Additionally, the appellant reasserts his arguments from below concerning the agency's alleged breach of the settlement agreement. *Id*.

¶8 The Clerk of the Board then issued a notice informing the parties that, because the appellant's petition for review of the compliance initial decision appears to also include argument relating to the validity of the settlement agreement, the Board has considered the appellant's filing as both a petition for review of the compliance initial decision and as a petition for review of the initial decision. PFRF, Tab 4. The Clerk informed the appellant that, to the extent that his filing is considered as a petition for review of the initial decision, it appears to be untimely filed because it was not filed by November 26, 2008, the date the initial decision became final, and the Clerk informed the appellant of his burden and the elements to establish that his petition for review of the initial decision was timely filed or that good cause exists for the filing delay. *Id*.

¶9 In response to the Clerk's notice and order, the appellant has filed a sworn motion to waive the filing deadline for his petition for review. PFRF, Tab 5. The agency has timely responded in opposition to the appellant's petition for review and to his sworn statement. PFRF, Tabs 3, 7.[1]

ANALYSIS

¶10 Where an appellant withdraws an appeal pursuant to a settlement agreement, he may challenge the validity of the settlement agreement, regardless of whether it has been entered into the record for enforcement, if he believes that

---

[1] Because the March 7, 2009 deadline for the agency's response to the appellant's sworn motion fell on a Saturday, the agency's Monday, March 9, 2009 response to the appellant's motion for a waiver is timely filed. *See Gaudin v. Department of the Treasury*, 109 M.S.P.R. 301, ¶ 6 n.2 (2008); PFRF, Tab 4 at 2, Tab 7; 5 C.F.R. § 1201.23 ("[i]f the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date").

the agreement is unlawful, involuntary, or the result of fraud or mutual mistake. *Wade v. Department of Veterans Affairs*, 61 M.S.P.R. 580, 583 (1994). An attack on the validity of a settlement agreement must be made in the form of a petition for review of the initial decision dismissing the case as settled. *Nichols v. Department of the Air Force*, 102 M.S.P.R. 551, ¶ 7 (2006), *aff'd*, 253 F. App'x 961 (Fed. Cir. 2007); *Washington v. Department of the Navy*, 101 M.S.P.R. 258, ¶ 11 (2006).

¶11 A petition for review must generally be filed within thirty-five days after the date of the issuance of the initial decision, or, if the appellant shows that the initial decision was received more than five days after the initial decision was issued, within thirty days after the date the appellant received the initial decision. 5 C.F.R. § 1201.114(d). The appellant's petition for review of the October 22, 2008 initial decision was filed on December 17, 2008, twenty-one days after the November 26, 2008 filing deadline. ID at 2; PFRF, Tab 1 at 1, 3-4, 6. The appellant does not allege that he received the initial decision more than five days after it was issued. PFRF, Tabs 1, 5. Thus, the petition for review is untimely filed by twenty-one days.

¶12 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. *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).

¶13 In his petition for review and in his sworn motion to waive the time limit, the pro se appellant appears to assert that good cause exists for waiving the deadline for filing his petition for review because he was not aware, until the administrative judge issued the compliance initial decision, that the settlement agreement was not enforceable by the Board, and because he would not have withdrawn his appeal had he been aware that the settlement agreement was not entered into the record for enforcement purposes. PFRF, Tabs 1, 5.

¶14 Before dismissing a matter as settled, the Board must decide whether the parties have entered into a settlement agreement, understand its terms, and intend to have the agreement entered into the record for enforcement by the Board. *Bruce v. Social Security Administration*, 108 M.S.P.R. 339, ¶ 3 (2008); *Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 149 (1988). The Board has repeatedly held that it is error for an administrative judge to dismiss an appeal based on a settlement agreement without documenting for the record whether the parties reached a settlement agreement, whether they understand the agreement's terms, and whether they have agreed that the settlement agreement is to be enforceable by the Board. *E.g.*, *Hester v. U.S. Postal Service*, 72 M.S.P.R. 149, 151 (1996); *Jimenez v. Department of Health & Human Services*, 70 M.S.P.R. 24, 26 (1996).

¶15 In this case, the administrative judge found in the initial decision that the appellant was withdrawing his appeal pursuant to the settlement agreement and that a copy of the agreement had been submitted as evidence of the appellant’s withdrawal of his appeal. ID at 1. The administrative judge, however, failed to make any findings as to whether the parties understood the terms of the agreement and whether they intended to have the agreement entered into the record for enforcement by the Board. ID at 1. The administrative judge’s error gives credence to the appellant’s sworn assertion that he was not aware, at the

time the initial decision was issued, that the settlement agreement would not be enforceable by the Board. PFRF, Tab 5 at 1; *see Hester*, 72 M.S.P.R. at 151.

¶16 However, in response to the appellant's sworn motion to waive the filing deadline and pursuant to the Clerk's show cause order on review, the agency submitted evidence, which was also submitted during compliance proceedings below, to rebut the appellant's assertions. PFRF, Tabs 4, 7; CF, Tab 7. Specifically, the agency has submitted copies of email correspondence during settlement negotiations with the appellant showing that, although an October 1, 2008 draft of the settlement agreement included a clause providing for Board enforceability of the agreement, the agency notified the appellant on October 2, 2008, that it had removed the draft Board enforceability clause from the agreement based on its understanding that the Board would not have jurisdiction to enforce the agreement. PFRF, Tab 7 at 10-13, 15, 17-19; CF, Tab 7 at 8-17. The agency's evidence shows that, although the appellant responded to the agency's October 2, 2008 email with other changes he wanted made to the settlement agreement, he did not dispute or address the agency's removal of the draft clause concerning Board enforceability of the settlement agreement. PFRF, Tab 7 at 20-22; CF, Tab 7 at 19-21.[2] The agency asserts, therefore, that the appellant has not shown good cause for waiving the filing deadline because he cannot show that he first learned that the settlement agreement was not enforceable by the Board at the time the administrative judge issued the December 9, 2008 compliance initial decision dismissing his petition for enforcement for lack of jurisdiction. PFRF, Tab 7 at 6-9.

---

[2] The administrative judge thus concluded properly that the Board lacked the authority to enforce the settlement agreement as it had not been entered into the record for enforcement purposes, and he correctly dismissed the appellant's petition for enforcement for lack of jurisdiction. *See Cimilluca v. Department of Defense*, 77 M.S.P.R. 256, 259 (1998).

¶17 We find that the evidence submitted by the agency rebuts the appellant's sworn assertions that he first learned that the settlement agreement was not enforceable by the Board when the administrative judge issued the compliance initial decision. *See, e.g.*, *Schaefer v. U.S. Postal Service*, 42 M.S.P.R. 592, 595 (1989) (the appellant failed to meet his burden of showing that his petition for review was filed in a timely manner where his affidavit on the timeliness issue was rebutted by the affidavit of the agency's representative). Therefore, although the settlement agreement is silent on the issue of enforceability, because the record shows that the appellant was aware during settlement negotiations that the settlement agreement would not be enforceable by the Board, his assertion that he first learned that the agreement is not enforceable by the Board when the administrative judge issued the compliance initial decision is without merit. IAF, Tab 6; CF, Tab 7 at 14; PFRF, Tab 5 at 1, Tab 7 at 15. Thus, because the filing delay is not minimal and the appellant's proffered reason for his untimely filing is contradicted by the evidence of record, we find that the appellant has not shown that good cause exists to waive the deadline for filing his petition for review of the initial decision that was untimely filed by twenty-one days. *See, e.g.*, *Rodriguez v. Department of the Navy*, 71 M.S.P.R. 396, 398 (1996) (eighteen-day delay in filing a petition for review was not minimal).

¶18 Accordingly, we dismiss the appellant's petition for review of the initial decision that dismissed his appeal as withdrawn pursuant to the settlement agreement as untimely filed with no good cause shown for the delay in filing.

ORDER

¶19 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review of the initial decision. The initial decision will remain the final decision of the Board with regard to the dismissal of the appeal as withdrawn. Title 5 of the Code of Federal Regulations, section 1201.113 (5 C.F.R. § 1201.113).

¶20 This is the final decision of the Merit Systems Protection Board in this compliance matter. 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.