UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 127

Docket No. CH-0752-09-0029-I-1

Edmond R. Rivera,

Appellant,

v.

Social Security Administration,

Agency.

July 9, 2009

Edmond R. Rivera, Louisville, Kentucky, pro se.

Robert Hodum, Jr., Esquire, and Deanna Sokolski, 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 of the initial decision that dismissed for lack of jurisdiction his appeal of his 30-day suspension for misconduct. For the reasons set forth below, we DISMISS his petition as untimely filed without a showing of good cause for the untimely filing.

BACKGROUND

¶2 On August 13, 2008, the agency proposed to suspend the appellant from his position as a Service Representative Trainee (SRT) for 30 days for misconduct. Initial Appeal File (IAF), Tab 13, Subtab 4F. The appellant filed an appeal

through the Board's electronic filing system on September 3, 2008. IAF, Tab 1. The administrative judge (AJ) ultimately dismissed the appeal for lack of jurisdiction. IAF, Tab 25, Initial Decision (ID). The initial decision informed the appellant that the initial decision would become the final decision of the Board on February 16, 2009, unless a petition for review was filed with the Board by that date. ID at 4. The initial decision reflects that it was sent to the appellant, as a registered electronic filer (e-filer), by electronic mail on January 12, 2009. ID at 7.

¶3 The appellant filed a petition for review on February 22, 2009, using the Board's electronic filing procedures. Petition for Review File (PFRF), Tab 1. That filing procedure informed the appellant that the February 16, 2009 filing deadline for his petition had passed and it prompted the appellant to provide the date he received the initial decision. *Id.* at 3. The appellant indicated that he received the initial decision on "2/20/2009 12:00:00 AM." *Id.* As good cause for his untimely filing, the appellant asserted that he was unable to timely file his petition due to an ice storm that caused his electricity to be out for 17 days (from February 3–19, 2009, and restored on February 20, 2009). *Id.* at 6. The agency has filed a response to the petition in which it asserts, in part, that the petition should be dismissed as untimely filed without a showing of good cause for the delayed filing. PFRF, Tab 3.

ANALYSIS

¶4 A petition for review must generally be filed within 35 days after the date of the issuance of the initial decision, or, if the appellant shows that the initial decision was received more than 5 days after the initial decision was issued, within 30 days after the date the appellant 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, 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. *See 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 initial decision clearly indicated that the appellant's petition for review had to be filed by February 16, 2009. ID at 4. Because February 16, 2009, was a federal holiday, the appellant actually had until February 17, 2009, in which to timely file his petition. 5 C.F.R. § 1201.23. We reject the appellant's assertion that he did not receive the initial decision until February 20, 2009. Our e-filer regulations provide that, as a registered e-filer, the appellant agreed to accept documents through electronic service and, further, that he was required to monitor his case activity at the Repository at e-Appeal Online to ensure that he received all case related documents. 5 C.F.R. § 1201.14(e), (j)(3). Moreover, our regulations provide that pleadings and Board documents served electronically on registered e-filers are deemed received on the date of electronic submission. 5 C.F.R. § 1201.14(m)(2). When a statute or regulation "deems" something to have been done, the event is considered to have occurred whether or not it actually did. *See Lima v. Department of the Air Force*, 101 M.S.P.R. 64, ¶ 5 (2006). Thus, we deem the appellant to have received the initial decision on January 12, 2009, and his petition was, therefore, filed 5 days untimely.

¶6 Although the appellant has made a sworn general assertion that an ice storm caused the loss of his electricity from February 3–19, 2009, as a circumstance beyond his control establishing good cause for filing his petition 5

days beyond the February 17, 2009 expiration of the 35-day filing time period, we find his sworn assertion insufficient to show that he exercised due diligence under the circumstances. A general claim that a natural disaster was responsible for an untimely filed petition for review does not show good cause for a waiver of the Board's filing time limit. *See Griffin v. Department of Defense*, 99 M.S.P.R. 208, ¶ 5 (2005) (general assertion that Hurricane Ivan affected the appellant's ability to timely file his petition was insufficient to show good cause where he failed to state with any specificity how the hurricane caused him to untimely file his petition), *vacated and remanded on other grounds*, 163 F. App'x 895 (Fed. Cir. 2006) (unpublished table decision); *Duran-Arcelay v. Office of Personnel Management*, 70 M.S.P.R. 13, 16 (1996) (general assertion of a hurricane was insufficient to show good cause where the appellant failed to state with any specificity how the hurricane caused him to untimely file his petition); *Corpus v. Office of Personnel Management*, 65 M.S.P.R. 315, 316-17 (1994) (asserted recurrence of a weekly typhoon and loss of electricity insufficient to show good cause for an untimely petition where the appellant failed to explain with any specificity how that affected her ability to timely file her petition), *appeal dismissed*, 52 F.3d 344 (Fed. Cir. 1995) (Table).

¶7 The appellant's sworn general assertion similarly fails to explain with any specificity how the loss of his electricity caused him to untimely file his petition. The appellant had from January 13 through February 2, 2009 (21 days), in which to review the initial decision prior to the asserted ice storm. To the extent the appellant is asserting that he did not review the initial decision during that time period, he has not provided any explanation for his failure to do so, and he has failed to show that he exercised due diligence in monitoring his case as required under the Board's e-filer regulations. *See* 5 C.F.R. § 1201.14(e), (j)(3). The appellant has not explained why he could not during the period of February 3-17, 2009, either handwrite and file his petition or seek an extension of time in which to file his petition under 5 C.F.R. § 1201.114(e) using regular mail service. The

initial decision informed the appellant that his petition "may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing." ID at 5. The Board's e-filer regulations provide that an e-filer may file any pleading by non-electronic means. 5 C.F.R. § 1201.14(f). Accordingly, we find that the appellant's 5-day untimely filing based on his general assertion that an ice storm caused the loss of his electricity from February 3-19, 2009, fails to show that he exercised due diligence in filing his petition and, therefore, that he has not shown good cause for his untimely filing. The Board will waive its filing time limit only upon a showing of good cause for the delayed filing no matter how short the delay. *See Stanley v. U.S. Postal Service*, 61 M.S.P.R. 225, 227 (1994), *aff'd***,** 39 F.3d 1198 (Fed. Cir. 1994) (Table); 5 C.F.R. § 1201.114(f).

¶8 We therefore DISMISS the petition as untimely filed without a showing of good cause for the delayed filing.

ORDER

¶9 This is the final order of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision remains the final decision of the Board concerning the dismissal of the appeal for lack of jurisdiction. 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.