UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 138

Docket No. AT-0752-09-0238-I-1

Angelo Melendez,

Appellant,

v.

Department of Homeland Security,

Agency.

July 21, 2009

Angelo Melendez, Tamarac, Florida, pro se.

Christopher C. Smith, Esquire, and Samuel Brandt, Esquire, Miami, Florida, 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 his appeal as untimely filed without a showing of good cause for the delayed filing. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and DISMISS this appeal as untimely filed without a showing of good cause for the untimely filing.

BACKGROUND

¶2 The appellant was a GS-1801-9 Sector Enforcement Specialist with the agency's Bureau of Customs and Border Protection in Pembroke Pines, Florida.

Initial Appeal File (IAF), Tab 1 at 1; Tab 6, Subtab 4a. The agency proposed to remove the appellant based on the charge of failing to properly respond to an emergency alert tone on March 24, 2008. IAF, Tab 6, Subtab 4e.

¶*3* In the agency's November 28, 2008 decision notice, the deciding official found that the evidence supported the charged misconduct and he sustained the proposed removal. *Id.*, Subtab 4b. The decision notice clearly informed the appellant of his right to file a Board appeal no later than 30 calendar days after the effective date of the removal or 30 days after his receipt of the decision, whichever occurred later. *Id.* at 2-3. The agency provided the appellant with a Board appeal form, a copy of the Board's regulations, and the address of the Regional Office to which the appellant was to send his appeal. *Id.* The decision notice reflects that the appellant signed it on December 5, 2008, and that the effective date of his removal was December 7, 2008. *Id.*, Subtabs 4a-4b.

¶4 The appellant e-filed an appeal 3 days untimely on January 9, 2009. IAF, Tab 1. The original administrative judge (AJ) issued an acknowledgment order that did not address the timeliness of the appellant's appeal and, further, simply informed the appellant that he "may" respond or object to any motion filed by the agency within 10 calendar days of the date that appears in the agency's certificate of service. IAF, Tab 2.

¶5 The agency filed a January 27, 2009 motion to dismiss the appeal as untimely filed, asserting that the effective date of the appellant's removal was December 7, 2008, the appellant had been informed in the decision notice that his appeal had to be filed no later than 30 calendar days after the effective date of his removal, and he had not shown good cause for his untimely filing because he had not shown that he exercised due diligence or ordinary prudence in filing his appeal. IAF, Tab 4. The agency thereafter filed a February 27, 2009 motion for clarification in which it asserted that, under the Board's regulations, the appellant's response to its previously filed motion to dismiss the appeal as untimely filed was due by February 6, 2009, but the agency had not yet received a

response. IAF, Tab 7. The record does not indicate that the appellant ever filed a response to the agency's motion to dismiss.

¶6 In the March 13, 2009 initial decision based on the record evidence, the AJ to whom the case had been reassigned found that the appellant had e-filed a January 9, 2009 appeal of his December 7, 2008 removal and, thus, that his appeal had been untimely filed by 3 days. IAF, Tab 8, Initial Decision (ID) at 1-2. The AJ set forth the appellant's burden to show that his appeal was timely filed or to show that there was good cause to excuse his untimely filing by showing that he exercised due diligence or ordinary prudence under the particular circumstances of this case or that he was prevented from timely filing his appeal due to circumstances beyond his control. ID at 2. The AJ found that the agency had fully informed the appellant of the relevant dates and the legal standard regarding the appellant's burden to show good cause for his untimely filing in its January 27, 2009 motion to dismiss the appeal, but that the appellant had failed to respond. ID at 2. Thus, the AJ found that the appellant had failed to show good cause for his untimely filed appeal and he dismissed the appeal. ID at 1-3.

¶7 The appellant has filed a petition for review in which he asserts, among other things, that he contacted the AJ and that he responded in writing to the agency's motion for clarification regarding his untimely filing. Petition for Review File (PFRF), Tab 1 at 3. The agency has filed a response in opposition to the petition and has indicated in a footnote to that response that:

> The Appellant has attached to his PFR a letter dated March 10, 2009, which was ostensibly sent to the AJ regarding the substance of the Agency's Motion for Clarification. However, this document was not filed with the Agency and was not received by the AJ within the time to show good cause for a waiver of the filing deadline.

PFRF, Tab 3 at 4 n.1. The agency subsequently submitted a copy of the appellant's March 10, 2009 letter, which the appellant had not filed directly with the Board with his petition for review. PFRF, Tabs 1, 3-4.

ANALYSIS

The AJ erred in dismissing this appeal prior to ordering the appellant to show cause why his appeal should not be dismissed as untimely filed.

¶8 "When an appeal appears to be untimely, the [AJ] has the responsibility of apprising the appellant of the timeliness issue and providing him with an opportunity to show good cause for the untimely filing." *Pierce v. U.S. Postal Service*, 60 M.S.P.R. 26, 28 (1993). The record in this case fails to show that the AJ ever informed the appellant of the need to respond to the timeliness issue. The acknowledgment order did not inform the appellant that his appeal appeared to have been untimely filed and, further, it informed him that he "may" respond to any motions filed by the agency, not that he was required to do so or face the dismissal of his appeal. IAF, Tab 2 at 1, 4. There is no order to show cause addressing the timeliness issue in the record. Even considering the appellant's assertion on review that he spoke to the AJ and thereafter responded in writing to the agency's motion for clarification, there is no summary of the AJ's communication in the record indicating that the appellant had been placed on notice of the requirement to respond or face dismissal of his appeal for failing to respond, or of the timeframe in which his response had to be filed. Although, as discussed below, the record reflects that the appellant was adequately informed of his burden regarding the timeliness issue through the agency's motion to dismiss, under the circumstances of this case, the record fails to show that the appellant was provided with a fair opportunity to respond to the timeliness issue before the AJ dismissed his appeal as untimely filed. *See Hall v. Department of the Army*, 78 M.S.P.R. 222, 225 (1998) ("When a petition for appeal is filed after the 30-day time limit for filing, an [AJ] should inform the parties that timeliness is an issue so that the parties are provided with a fair opportunity to respond to the timeliness issue."). Accordingly, we vacate the initial decision.

The appellant has failed to establish good cause for the untimely filing of his appeal.

¶9 Although the lack of an order addressing the timeliness issue also means that the AJ did not fulfill his responsibility to inform the appellant of his burden to show that he exercised due diligence or ordinary prudence in filing his appeal so as to establish good cause for a waiver of the filing time limit, the Board has held that an AJ's failure to provide an appellant with proper notice regarding an issue can be cured if the agency's pleadings contained the proper notice or if the initial decision itself puts the appellant on notice of what he must do to address the issue, thus affording him with the opportunity to meet his burden regarding the issue in a petition for review. *See Easterling v. U.S. Postal Service*, 110 M.S.P.R. 41, ¶ 11 (2008); *Mapstone v. Department of the Interior*, 106 M.S.P.R. 691, ¶ 9 (2007). We find that the agency's motion to dismiss and the initial decision placed the appellant on notice of his burden regarding the timeliness issue such that he was able to address that issue in his petition for review. ID at 2; IAF, Tab 4.

¶10 An appeal must be filed no later than 30 days after the effective date of the action being appealed or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). This time limit may be waived only upon a showing of good cause for the delay in filing. *See Powell-Johnson v. U.S. Postal Service*, 103 M.S.P.R. 340, ¶ 10 (2006); 5 C.F.R. §§ 1201.12, 1201.22(c). Because the appellant received the agency's decision no later than December 7, 2008, the 30-day time limit began to run from the December 7, 2008 effective date of his removal and his appeal should therefore have been filed no later than January 6, 2009.

¶11 To establish good cause for an untimely appeal, 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 the appellant's excuse and his showing of due diligence, whether the appellant is 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 appeal. *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).

¶12 Generally, the Board will not consider evidence submitted for the first time with a petition for review absent a showing that it was unavailable before the record on appeal closed despite the party's due diligence. *Williams v. U.S. Postal Service*, 61 M.S.P.R. 213, 215 (1994); 5 C.F.R. § 1201.115. We will consider the evidence submitted for the first time on review in this case because, as noted above, we find that the record fails to reflect that the AJ gave the appellant the required fair opportunity to address the timeliness issue below. *See Drake v. Office of Personnel Management*, 95 M.S.P.R. 367, ¶¶ 5-6 (2004) (the Board considered evidence of a timely filed appeal submitted for the first time on petition for review where the AJ failed to inform the appellant of the date upon which he relied in dismissing the appeal, to require the appellant's statement to be sworn or in affidavit form, or to afford proper evidentiary weight to the appellant's unsworn, but undisputed, statement that the appeal was timely filed); *Williams*, 61 M.S.P.R. at 215 (finding an affidavit submitted on petition for review was previously unavailable where the AJ failed to inform the appellant that his response on timeliness must be in affidavit form).

¶13 The appellant asserts in his March 10, 2009 letter to the AJ that he did not timely file his appeal following his December 7, 2008 removal because he had made prior plans to leave in the second week of December to spend the Christmas holiday with relatives in the "North East." PFRF, Tab 4 at 7. The appellant asserts that he was not able to return to file his appeal sooner because bad weather delayed his return and once he returned he did not realize that the date

for filing his appeal would end on January 6, 2009. *Id.* The appellant asserts that, as a result of his trip planning, the bad news of losing his job "did not take [e]ffect until I [had] return[ed] home." *Id.*

¶14 We find that the appellant's asserted excuse for failing to timely file his appeal demonstrates a total lack of due diligence and ordinary prudence in filing his appeal. The decision notice clearly informed the appellant of the filing deadline. IAF, Tab 6, Subtab 4b. The Board will not excuse filing delays based on asserted confusion where the appellant has been placed on clear notice of a filing time limit. *See Crook v. U.S. Postal Service*, 108 M.S.P.R. 553, ¶¶ 5-6, *aff'd*, 301 F. App'x 982 (Fed. Cir. 2008). The appellant's prior plans to depart on an extended Christmas vacation do not provide good cause for his untimely filing, as the Board has held that the Christmas holidays and other competing time demands do not constitute good cause for an untimely filing. *See Dooley v. Department of the Air Force*, 57 M.S.P.R. 684, 690 (1993), *aff'd*, 22 F.3d 1105 (Fed. Cir. 1994) (Table); *see also Stibbe v. Government Printing Office*, 57 M.S.P.R. 5, 6-7 (1993).

¶15 The appellant's unspecified assertion that bad weather delayed his return home also fails to show good cause for his untimely filing. The appellant does not assert when the bad weather occurred, how long it lasted, or how it affected his ability to file his appeal. A general claim that a natural disaster was responsible for an untimely filing 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 for review 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); *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 for review); *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 was insufficient to show good cause for an untimely petition for review 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).

¶16 We find that the appellant has not shown that he exercised due diligence or ordinary prudence in filing his appeal and, therefore, that he has not shown good cause for his 3-day filing delay. Although the appellant is pro se and the filing delay was 3-days, the Board will waive its filing time limit only upon a showing of good cause for the delayed filing no matter how short the filing delay. *See, e.g., White v. Department of Justice*, 103 M.S.P.R. 312, ¶ 10 (2006), *aff'd*, 230 F. App'x 976 (Fed. Cir. 2007).

ORDER

¶17 Accordingly, we DISMISS this appeal as untimely filed without a showing of good cause for the delayed filing. This is the final decision of the Merit Systems Protection Board in 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.