

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

2009 MSPB 181

Docket No. PH-0353-07-0455-I-3

**Robert M. McCoy,
Appellant,**

v.

**United States Postal Service,
Agency.**

September 3, 2009

Robert M. McCoy, Rices Landing, Pennsylvania, pro se.

Daniel J. Monahan, Esquire, Philadelphia, Pennsylvania, 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¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) dismissing his appeal as withdrawn due to settlement, which we also construe as a motion to reopen. For the reasons set forth below, we DISMISS the PFR as untimely filed without a showing of good cause for the delay and DENY the motion to reopen.

BACKGROUND

¶2 The appellant filed an appeal challenging the agency's failure to reemploy him after the completion of his military service, pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, [38 U.S.C. §§ 4301-](#)

4333 (USERRA). Initial Appeal File (IAF), Tab 13.¹ On November 3, 2008, during the prehearing conference, the parties' representatives announced that they had reached a settlement "in principle." IAF, Tab 21. On November 19, 2008, the agency filed the settlement agreement, signed by both representatives, that resolved the appeal. IAF, Tab 22. The settlement specifically provided that the appellant had reviewed and understood the agreement, had discussed the agreement with his attorney, and had voluntarily accepted the agreement as resolving all his claims. *Id.* at 7. On November 24, 2008, the AJ issued an ID dismissing the appeal as withdrawn based upon the terms of the settlement agreement. IAF, Tab 23.

¶3 On June 30, 2009, the appellant filed a PFR challenging the ID on the grounds that his attorney had no authority to settle the case and the appellant knew nothing about the settlement because he was incarcerated while it was being negotiated. Petition for Review File (PFRF), Tab 1. The Clerk of the Board issued a notice stating that the PFR appeared untimely and directing the appellant to respond on the issue of timeliness. PFRF, Tab 2. The appellant did so. PFRF, Tab 3. The agency filed a response in opposition. PFRF, Tab 4.

ANALYSIS

¶4 The appellant argues that his incarceration and subsequent search for new counsel established good cause for his delay. PFRF, Tab 3. The appellant states that he was incarcerated from October 31, 2008 to January 1, 2009, and that he did not learn about the ID until his January 2009 release. *Id.* The appellant further argues that he spent the next several months searching in vain for counsel to take his case before he finally filed a PFR on his own. *Id.* The appellant also mentions that his former attorney's alleged misconduct particularly upset him

¹ The appellant's appeal had twice been voluntarily dismissed in MSPB Docket No. PH-0353-07-0455-I-1 and MSPB Docket No. PH-0353-07-0455-I-2. *See* Initial Appeal File-I1 (IAF-I1), Tab 20; Initial Appeal File-I2 (IAF-I2), Tab 10.

because he has “a little brain damage.” *Id.* The appellant has failed to show good cause for his delay.

Legal Standards

¶5 A petition for review must be filed within 35 days after the date the ID was issued, or, if the appellant received the ID more than 5 days after it was issued, within 30 days after the date that he received the ID. [5 C.F.R. § 1201.114](#)(d). This time limit can only be waived if the appellant makes a showing of good cause for the delay in filing the petition. [5 C.F.R. §§ 1201.12](#), 1201.114(f). To establish good cause for a late appeal, the appellant must show that he exercised due diligence or ordinary prudence under the circumstances of his case. *See Stempihar v. U.S. Postal Service*, [106 M.S.P.R. 115](#), ¶ 4 (2007). In assessing good cause for a late filing, the Board considers the length of the delay, the reasonableness of the excuse, the showing of due diligence, whether the appellant is pro se, and whether the appellant has shown circumstances beyond his control or an unavoidable causality that impaired his ability 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).

¶6 If an ID dismisses an appeal as settled, newly discovered evidence that shows the settlement agreement is invalid will establish good cause for an untimely PFR. *Graves v. Department of Veterans Affairs*, [82 M.S.P.R. 38](#), ¶ 11 (1999). To establish that a late filing should be excused due to an illness or medical condition, the appellant must: (1) identify the specific time period that he suffered from the illness; (2) submit corroborating evidence showing that he suffered from the illness during the specified time period; and (3) explain why the illness prevented him from filing a timely appeal or a motion for an extension of time. *See Coleman v. U.S. Postal Service*, [91 M.S.P.R. 469](#), ¶ 5 (2002). There is no general requirement that the appellant be incapacitated, but the appellant must explain why the illness impaired his ability to meet the filing deadline. *See Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 437 n.* (1998).

The Appellant's Claims

¶7 At the outset, that the appellant was incarcerated does not establish good cause for a late filing in the absence of an explanation how the incarceration prevented him from filing a PFR or otherwise prosecuting his appeal. *See Burton v. Office of Personnel Management*, [93 M.S.P.R. 402](#), ¶6 (2003). Here, the appellant says nothing regarding how his incarceration prevented him from filing a PFR. His incarceration was also irrelevant to his further delay of approximately 6 months from his release until he actually filed the PFR. *See id.* (the appellant does not explain why he failed to file a PFR during the period that he was not incarcerated).

¶8 In addition, a lack of representation, or an inability to obtain representation, also fails to establish good cause to excuse an untimely PFR. *See Minor v. Department of the Air Force*, [109 M.S.P.R. 692](#), ¶ 8 (2008). Notably, the appellant was previously advised that counsel was not required in Board proceedings and that if he were unable to obtain counsel that he would have to proceed as best he could pro se. IAF-I1, Tab 12.

¶9 Further, the appellant has not explained his claimed “brain damage” or elaborated upon it on PFR,² and the appellant makes no effort to link the condition with his delay in filing a PFR. *See Coleman*, [91 M.S.P.R. 469](#), ¶ 5. Moreover, any suggestion that he suffers any disabling condition is refuted by his own statements below. IAF, Tab 11, Exhibit 1 at 178, 197.

¶10 The appellant's discovery of evidence of fraud or other misconduct that potentially invalidates the settlement agreement could provide good cause for the delayed filing. *See Graves*, [82 M.S.P.R. 38](#), ¶ 11. But even assuming the appellant's discovery of his attorney's alleged misconduct would constitute such new evidence, this evidence would not provide good cause for the appellant's subsequent 6-month delay in filing a PFR. *See Hawley v. Social Security*

² Nor did he explain this alleged condition below.

Administration, [108 M.S.P.R. 587](#), ¶ 5 (2008) (the appellant failed to show good cause where he waited 4 months to file a PFR after learning of the alleged fraud); *Graves*, [82 M.S.P.R. 38](#), ¶ 12 (the appellant failed to show good cause for his late filing because he waited over a month after discovering the alleged fraud to file a pleading with the Board).

¶11 Similarly, the Board will only reopen a case if the appellant has exercised due diligence in seeking the reopening. See *Caracciolo v. Office of Personnel Management*, [86 M.S.P.R. 601](#), ¶ 4 (2000). Here, the appellant's 6-month delay amply demonstrates that he was not duly diligent and his request to reopen the appeal must be denied. See generally *Griffin v. Office of Personnel Management*, [104 M.S.P.R. 540](#), ¶ 10 (2007), *aff'd*, 263 F. App'x 867 (Fed. Cir. 2008) (the Board will not normally reopen an appeal simply to cure the untimeliness of a PFR).

ORDER

¶12 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the Board's final decision with regard to the dismissal of the appeal as settled. [5 C.F.R. § 1201.113](#).

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.