UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 208

Docket No. CH-752S-08-0819-I-1

Scott L. Kroeger,
Appellant,
v.
United States Postal Service,
Agency.

October 15, 2009

Jerome Johnson, Chicago, Illinois, for the appellant.

Lana S. Johnson, Esquire, Chicago, Illinois, 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 of a 14-day suspension for lack of jurisdiction. For the reasons set forth below, we DISMISS the PFR as untimely filed without a showing of good cause for the delay.

BACKGROUND

¶2 The appellant filed an appeal of a 14-day suspension. Appeal File (AF), Tab 1. The administrative judge (AJ) issued an ID on January 8, 2009, dismissing the appeal on the grounds that the Board does not have jurisdiction over a suspension of 14 days or less. *Id.*, Tab 7. The ID became final on

February 12, 2009, when neither party filed a PFR. 5 U.S.C. § 1201.113. On July 2, 2009, almost 5 months after the expiration of the filing deadline, the appellant filed a PFR. Petition for Review File (RF), Tab 1. His PFR did not address the issue of the Board's jurisdiction over his suspension but rather the merits of the agency's subsequent decision to remove him from his position as a Tractor Trailer operator. *Id.* The appellant included a completed form for a motion to accept a late filed PFR, in which he stated that the agency had been uncooperative in the removal process. *Id.* The agency responded in opposition to the PFR. RF, Tab 3.[*]

¶3 The Clerk of the Board (Clerk) issued a Show Cause Order directing the appellant to clarify whether he intended to file a PFR of the ID dismissing his suspension appeal or was only challenging his subsequent removal from federal employment. RF, Tab 4. The Order also informed the appellant that his PFR appeared to be untimely and directed him to file a written response with evidence and argument showing that it was timely or that there was good cause for any delay. *Id.* The appellant did not respond.

ANALYSIS

¶4 Given the appellant's pro se status, we construe his PFR as a challenge to the ID dismissing his suspension appeal for lack of jurisdiction. *See Patterson v. U.S. Postal Service*, 71 M.S.P.R. 332, 335 (1996) (petition for enforcement interpreted in the way most favorable to the appellant), *aff'd*, 106 F.3d 425 (Fed. Cir. 1997); *Melnick v. Department of Housing and Urban Development*, 42 M.S.P.R. 93, 97 (1989) (a pro se appellant's pleadings are to be liberally construed), *aff'd*, 899 F.2d 1228 (Fed. Cir. 1990) (Table).

---

[*] The agency also filed a motion to dismiss the PFR because of the terms of a settlement agreement reached in the appellant's grievance of his removal. Because we dismiss the appellant's petition as untimely filed, we need not consider the agency's motion to dismiss the PFR because of the settlement.

¶5 To be timely, a PFR must be filed within 35 days after the AJ issued the ID or, if the appellant shows that the ID was received more than 5 days after the date of issuance, within 30 days after the date of receipt. *Lawson v. Department of Homeland Security*, 102 M.S.P.R. 185, ¶ 5 (2006); 5 C.F.R. § 1201.114(d). The Board will waive the time limit for filing only upon a showing of good cause for the delay. *Olivares v. Merit Systems Protection Board*, 17 F.3d 386, 388 (Fed. Cir. 1994); 5 C.F.R. §§ 1201.12, 1201.114(f).

¶6 To establish good cause for a delay in filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of his case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The Board considers the length of the delay in every good cause determination. *See Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1582 (Fed. Cir. 1994); *Walker v. Department of the Air Force*, 109 M.S.P.R. 261, ¶ 5 (2008). In addition, the Board considers the reasonableness of the appellant's excuse, whether he is proceeding pro se, and whether there is evidence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune that prevented him from timely filing his PFR. *See Walls*, 29 F.3d at 1582; *Wyeroski v. Department of Transportation*, 106 M.S.P.R. 7, ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶7 The appellant has failed to show that he exercised the due diligence or ordinary prudence that would justify waiving the deadline for filing a PFR. The appellant is pro se. However, his delay of almost 5 months in filing a PFR is significant, and he did not respond to the Clerk's Order to explain his delay. *See Guevara v. Department of the Navy*, 112 M.S.P.R. 39, ¶ 7 (2009); *Waldo v. Department of the Air Force*, 91 M.S.P.R. 326, ¶ 5 (2002). Moreover, the ID informed the appellant that it would become the final decision of the Board in 35 days, i.e., on February 12, 2009, unless a PFR was filed by that date. AF, Tab 7 at 4. The Board has declined to find good cause for an untimely filing where, as here, the ID clearly notified the appellant of the time limit within which to file

his PFR, and he failed to do so. *Guevara*, 112 M.S.P.R. 39, ¶ 7; *Crook v. U.S. Postal Service*, 108 M.S.P.R. 553, ¶ 6, *aff'd*, 301 F. App'x 982 (Fed. Cir. 2008). Finally, we find that the appellant's argument that the agency was uncooperative in proceedings on his removal does not show circumstances beyond his control or unavoidable casualty or misfortune that would constitute good cause for his failure to timely file a PFR regarding his suspension.

¶8 We therefore DISMISS the appellant's PFR as untimely filed without a showing of good cause for the delay.

ORDER

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