UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 209

Docket No. DC-0731-09-0503-I-1

Darrick J. Moore,

Appellant,

v.

Office of Personnel Management,

Agency.

October 15, 2009

Darrick J. Moore, Hyattsville, Maryland, pro se.

Carol A. Means, Boyers, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed as untimely filed his appeal of a suitability action by the Office of Personnel Management (OPM) that resulted in his removal. For the reasons set forth below, we DISMISS the petition as untimely filed with no good cause shown for the delay.

BACKGROUND

¶2 By letter dated April 28, 2008, the OPM notified the appellant that it had found him unsuitable for federal employment and had taken the following actions: directed his employing agency, the District of Columbia Pretrial

Services Agency (PSA), to remove him from the rolls within 5 work days of its receipt of the decision; cancelled any reinstatement eligibility obtained from his current appointment and any other eligibilities he may have had on existing competitive registers; cancelled any pending applications; and debarred him from competition for, or appointment to, any competitive service position for a period of 3 years. Initial Appeal File (IAF), Tab 1 at 12. The record does not include an SF-50 recording the appellant's removal, but neither party disputes that PSA complied with OPM's instruction.

¶3 The appellant filed his appeal with the Board on April 27, 2009, and OPM thereafter moved to dismiss the appeal as untimely filed. IAF, Tabs 1, 4. On June 26, 2009, the administrative judge issued an initial decision dismissing the appeal as untimely filed. IAF, Tab 8, Initial Decision (ID) at 1. The initial decision notified the appellant that the decision would become final on July 31, 2009, unless a petition for review was filed by that date. ID at 7.

¶4 The appellant's petition for review was filed 18 days after the initial decision became final, on August 18, 2009. Petition for Review File (PFRF), Tab 1. The Clerk of the Board thereafter provided the appellant notice that his petition was untimely filed, that petitions that appear to be untimely must be accompanied by a motion to accept the filing as timely and/or to waive the time limit for good cause, and that, if he wanted to file such a motion, it must include a sworn statement showing either that the motion was timely filed or that there is good cause for the late filing. PFRF, Tab 2 at 1. The notice further stated that any such motion must be postmarked if mailed or sent by facsimile on or before September 2, 2009. *Id.* at 2. The appellant thereafter submitted a motion to waive the deadline for filing his petition for good cause. PFRF, Tab 3. Although the motion is postmarked September 14, 2009, and therefore also appears to be untimely, we have nonetheless considered the arguments he raises therein.

ANALYSIS

¶5 To be timely, a petition for review must be filed within 35 days after the initial decision was issued, 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). As we have indicated above, the appellant's petition for review was not filed until August 18, 2009, a date that is 53 days after June 26, 2009, the date on which the initial decision was issued. The appellant alleges that he did not receive that decision before August 16, 2009, and that he was otherwise unaware that it had been issued; and he indicates that these circumstances resulted from the regional office's having mailed the decision to his previous address in Washington, D.C., rather than to his current address in Maryland. PFRF, Tab 3 at 1.

¶6 The regulatory deadline for filing a petition for review is not intended to postpone the deadline for filing a petition for review where delayed receipt of the initial decision is due to a party's own negligence. *Laboy v. U.S. Postal Service*, 103 M.S.P.R. 570, ¶ 5 (2006); *Lima v. Department of the Air Force*, 101 M.S.P.R. 64, ¶ 4 (2006). The certificate of service reflects that the initial decision was mailed to the appellant's address of record in Washington, D.C. ID at 10; *see* IAF, Tab 1 at 1 (indicating that the appellant's current address was in Washington, D.C.); *id.*, Tab 6 (envelope containing the appellant's subsequent submission, bearing the same address). The Board has held that service on an appellant at the last address of record is proper. *D'Aquin v. Office of Personnel Management*, 65 M.S.P.R. 499, 503 (1994). We find that the appellant's delayed receipt of the initial decision was the product of his failure to provide the Board with a current address. It is well established that an appellant is responsible for ensuring the receipt and forwarding of his mail. *Lima*, 101 M.S.P.R. 64, ¶ 4; *Johnson v. Department of the Navy*, 73 M.S.P.R. 431, 433 (1997). Thus, we find that the deadline for filing the petition for review in this case was July 31, 2009,

35 days after the initial decision was issued. The appellant's petition for review was therefore untimely filed by 18 days.

¶7 To establish good cause for the untimely filing of a petition for review, 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. *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).

¶8 In this case, the filing delay of 18 days is not minimal. *See Rodriguez v. Department of the Navy*, 71 M.S.P.R. 396, 398 (1996). In his motion to waive the deadline for filing his petition, the appellant states that because the initial decision was sent to a prior address, he was unaware of the time limit for filing a petition for review. PFRF, Tab 3 at 1, 3. That explanation does not show that the appellant exercised due diligence or ordinary prudence. As stated above, the appellant does not dispute that the initial decision was sent to the address of record that he provided to the regional office, and he does not contend that he advised the Board of any change of address. *See* IAF, Tab 1 at 1; *id.*, Tab 8 at 10. Even though the appellant is acting pro se, his failure to ensure that his mail was sent or forwarded to the proper address indicates that he has failed to act with due diligence under the circumstances of this case.

¶9 Therefore, the petition is DISMISSED as untimely filed with no good cause shown for the delay.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision remains the final decision of the Board concerning the dismissal of the appellant's appeal as untimely filed. 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.