UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 13

Docket No. SE-0831-01-0273-I-1

Prudencio V. Robles, Jr.,
Appellant,
v.
Office of Personnel Management,
Agency.

January 13, 2010

Prudencio V. Robles, Jr., Olongapo City, Philippines, pro se.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision (ID) affirming the Office of Personnel Management's (OPM's) reconsideration decision denying his application for a retirement annuity under the Civil Service Retirement System (CSRS). For the reasons set forth below, the Board DISMISSES the appellant's petition for review (PFR) as untimely filed by more than 8 years without a showing of good cause for the filing delay.

BACKGROUND

¶2 The appellant is a Filipino national who applied for a deferred retirement annuity under CSRS based upon his service under various appointments with the Department of the Navy. Initial Appeal File (IAF), Tab 1 at 1, 11-19. In initial and reconsideration decisions, OPM denied the appellant's request for an annuity, finding that the appellant had only served under non-permanent appointments, and therefore he had not completed 5 years of "required service for title to a deferred annuity"; thus, the appellant was not entitled to an annuity. *Id*. at 11-13.

¶3 The appellant timely filed a Board appeal of OPM's reconsideration decision, and designated a representative. IAF, Tab 1 at 1-2, 7-9. On October 29, 2001, the administrative judge issued an ID that affirmed OPM's reconsideration decision, and apprised the appellant of the December 3, 2001 deadline for filing a PFR. ID at 2, 6-7.

¶4 On September 22, 2009, approximately 8 years and 9 months after the filing deadline, the appellant filed a PFR of the ID. PFR File (PFRF), Tab 1. On October 9, 2009, the Office of the Clerk issued a notice informing the appellant that the Board may dismiss his PFR as untimely unless he filed a motion, including a statement, signed under penalty of perjury, or an affidavit, showing that his PFR was timely filed or that good cause existed for the filing delay. PFRF, Tab 2. The appellant did not respond to the Clerk's notice. OPM has responded in opposition to the PFR. PFRF, Tab 4.

ANALYSIS

¶5 A PFR must be filed within 35 days after the issuance of the ID or, if the petitioner shows that the ID was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the ID. 5 C.F.R. § 1201.114(d). The Board will waive this time limit only upon a showing of good cause for the filing delay. 5 C.F.R. § 1201.114(f). The appellant bears the

burden of proof with regard to timeliness. *Smith v. Department of the Army*, 105 M.S.P.R. 433, ¶ 4 (2007).

¶6 The Board may grant or deny the waiver of a time limit for filing a PFR, in the interest of justice, after considering all the facts and circumstances of a particular case. *Smith*, 105 M.S.P.R. 433, ¶ 5. To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Id.*; *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. *Smith*, 105 M.S.P.R. 433, ¶ 5; *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).

¶7 Although the ID clearly informed the appellant of the December 3, 2001 deadline, he filed his PFR approximately 8 years and 9 months late. *See* PFRF, Tab 1; ID at 2. Further, the appellant did not respond to the Clerk's notice to address the timeliness issue. *See* PFRF, Tab 2. Although the appellant is pro se on review, the filing delay is significant, and he has not presented any evidence or argument to show that good cause exists for waiving the filing deadline. *See Groesbeck v. Office of Personnel Management*, 109 M.S.P.R. 1, ¶ 4 (2008) (where the appellant untimely filed her PFR by 6 months and did not respond to the Clerk's notice to establish good cause for the delay, the Board dismissed the PFR as untimely filed); *Wirzberger v. Department of the Treasury*, 101 M.S.P.R. 448, ¶ 8 (the appellant's year-long delay in filing her PFR was significant), *review dismissed*, 212 F. App'x 965 (Fed. Cir. 2006). He merely re-argues his alleged entitlement to an annuity, which does not establish good cause for waiving the

filing deadline. PFRF, Tab 1; *see Crook v. U.S. Postal Service*, 108 M.S.P.R. 553, ¶ 7, *aff'd*, 301 F. App'x 982 (Fed. Cir. 2008). Thus, the appellant has failed to show that he exercised due diligence or ordinary prudence in this case that would justify waiving the filing deadline.

¶8 We therefore DISMISS the petition for review as untimely filed without a showing of good cause for the delay. *

ORDER

¶9 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

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* For the first time on review, the appellant submits copies of the following documents: Public Law 730, Chapter 1148; *Dorry v. Office of Personnel Management*, 35 M.S.P.R. 264 (1987); and a February 23, 1987 letter from the Employee Relations and Services Division, Consolidated Civilian Personnel Office, determining that another individual was not covered by CSRS and therefore was ineligible to make an annuity deposit. Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the PFR absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant has made no such showing.

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.