

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

2010 MSPB 26

Docket No. SF-0752-09-0903-I-1

**Susan R. Brakefield,
Appellant,**

v.

**Department of Commerce,
Agency.**

February 2, 2010

Susan R. Brakefield, Barstow, California, pro se.

Ronda Brown, 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 has filed a petition for review (PFR) of the initial decision (ID) that dismissed her appeal without prejudice to refiling. We find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), however, AFFIRM the ID, DEEM the appeal timely refiled, and FORWARD the case to the regional office for docketing as a refiled appeal.

BACKGROUND

¶2 On August 17, 2009, the appellant filed a timely appeal of her July 18, 2009 removal from a GS-4 Field Representative position with the Census Bureau. Initial Appeal File (IAF), Tabs 1, 3, subtab 4a. On September 23, 2009, however, she moved to dismiss her appeal for 90 days without prejudice to refiling to allow her time to retain counsel. *Id.*, Tab 4. In his October 14, 2009 ID, the administrative judge dismissed the appeal without prejudice, subject to automatic refiling 36 days after the date of the ID. IAF, Tab 6.

¶3 On November 17, 2009, the appellant filed a PFR of the ID before it became final.¹ PFR File, Tab 1. The agency filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

¶4 After full consideration, we find that the PFR does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#) because it does not establish that the administrative judge erred in dismissing the appeal without prejudice to refiling. The appellant filed her PFR, however, before the deadline set forth by the

¹ With her PFR, the appellant submitted her father's death certificate, which is dated August 27, 2009, and shows that he died in June. The appellant has failed to show or even assert that the certificate was unavailable before the record was closed despite her due diligence. Thus, the Board does not need to consider it. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). In any event, the administrative judge acknowledged the appellant's assertion that her father's death hampered her ability to proceed with her appeal. Contrary to the appellant's assertion on PFR, the ID does not indicate that the administrative judge doubted the appellant's credibility in that regard. Thus, even if the death certificate is considered to be new evidence, it does not provide a basis for granting Board review because it does not warrant a different outcome. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

The appellant has also submitted her motion to dismiss without prejudice and the objection to the ID that she faxed to the regional office on October 28, 2009. Those documents are already part of the record and, thus, are not new. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). Nonetheless, because the administrative judge did not consider the objection to the ID, we have considered it on review.

administrative judge for automatic refiling of the appeal.² We find that the PFR constitutes notice that the appellant is refiling her appeal and that she filed it within the 36 days provided by the administrative judge. Thus, we deem the appeal to be timely refiled. Accordingly, the file must be forwarded to the regional office for docketing as a refiled appeal and for adjudication. *See, e.g., Milberger v. Department of Health & Human Services*, [82 M.S.P.R. 72](#), ¶ 4 (1999); *Washington v. U.S. Postal Service*, [78 M.S.P.R. 650](#), ¶ 4 (1998). In forwarding the appeal, we note that more than the 90 days the appellant initially requested in her motion to dismiss without prejudice have now passed.

ORDER

¶5 This is the final decision of the Merit Systems Protection Board on the appellant's PFR of the October 14, 2009 ID. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)). We FORWARD the file to the Western Regional Office for docketing and adjudication as a refiled appeal.

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

² The record does not indicate that the regional office automatically refiled the appeal.

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.