

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

2010 MSPB 51

Docket No. SE-0831-99-0138-I-1

**Leonardo Alvarado,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

March 15, 2010

Rufus F. Nobles, I, Mandaluyong City 1550, for the appellant.

Judy Cloyes, 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 of a May 26, 1999 initial decision that affirmed the reconsideration decision of the Office of Personnel Management denying his application for benefits under the Civil Service Retirement System. For the reasons set forth below, we DISMISS the petition for review as untimely filed by more than ten years with no showing of good cause for the delay.

BACKGROUND

¶2 On December 15, 1998, the Office of Personnel Management issued a reconsideration decision in which it denied the appellant's application for a retirement annuity. Initial Appeal File (IAF), Tab 3, Subtab 2. The appellant appealed and, in an initial decision dated May 26, 1999, the administrative judge affirmed the reconsideration decision. IAF, Tabs 1, 5. The initial decision informed the parties that it would become the final decision of the Board on June 30, 1999, unless a party filed a petition for review by that date. IAF, Tab 5 at 4.

¶3 On or about October 20, 2009, the appellant filed a petition for review in which he argued the merits of his appeal without acknowledging that his petition for review was late. Petition for Review (PFR) File, Tab 1. The Clerk of the Board informed the appellant that his petition for review appeared to be untimely because it should have been filed on or before June 30, 1999, and that the Board's regulations required untimely-filed petitions for review to be accompanied by a motion to accept the petition as timely filed and/or to waive the filing time limit for good cause and an affidavit or statement signed under penalty of perjury setting forth good cause for the untimely filing. PFR File, Tab 2. The Clerk enclosed a copy of the Board's "Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit" and ordered the appellant to file his motion and an affidavit or statement signed under penalty of perjury setting forth good cause for the untimely filing on or before November 21, 2009. *Id.* The appellant has not responded to the Clerk's notice. The Office of Personnel Management has not responded to the appellant's petition for review.

ANALYSIS

¶4 A petition for review must be filed within thirty-five days after the date of issuance of the initial decision. *Walker v. Department of Health & Human Services*, [111 M.S.P.R. 473](#), ¶ 5 (2009); *Williams v. Office of Personnel*

Management, [109 M.S.P.R. 237](#), ¶ 7 (2008); *Stribling v. Department of Education*, [107 M.S.P.R. 166](#), ¶ 7 (2007); [5 C.F.R. § 1201.114\(d\)](#). The Board will waive the filing deadline only upon a showing of good cause for the delay in filing. *Walker*, [111 M.S.P.R. 473](#), ¶ 5; *Williams*, [109 M.S.P.R. 237](#), ¶ 7; *Stribling*, [107 M.S.P.R. 166](#), ¶ 7; [5 C.F.R. § 1201.114\(f\)](#). 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. *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).

¶5 Here, the deadline for filing a petition for review was June 30, 1999, and the appellant filed his petition for review on or about October 20, 2009, more than ten years late. IAF, Tab 5 at 4; PFR File, Tab 1. The appellant has not alleged that he received the initial decision more than five days after it was issued. PFR File, Tab 1. Although the Clerk afforded the appellant the opportunity to show good cause for the untimely filing, the appellant has not offered any reason for the delay in filing his petition for review, and he failed to respond to the Clerk's notice on the untimeliness of his petition for review.* Thus, we find that the appellant has failed to demonstrate good cause for the untimeliness of his petition for review. *See Bell v. Department of Homeland Security*, [112 M.S.P.R. 33](#), ¶ 8 (2009); *Garside v. Office of Personnel*

* We note that the appellant in this appeal is not pro se.

Management, [109 M.S.P.R. 65](#), ¶ 6 (2008); *Roberts v. Department of Commerce*, [106 M.S.P.R. 674](#), ¶ 5 (2007).

¶6 Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing. In reaching this decision, we have not considered the documents that the appellant submitted for the first time with his petition for review because they are not relevant to the timeliness issue and because he has not shown that they are based on new and material evidence that, despite his due diligence, not available before the record closed below. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); [5 C.F.R. § 1201.115](#).

ORDER

¶7 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 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.