

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

2010 MSPB 84

Docket No. CH-3443-08-0348-I-1

**Bradley Miller,
Appellant,**

v.

**Department of the Army,
Agency.**

May 6, 2010

David Dean, Lugoff, South Carolina, for the appellant.

Susan K. Luther, Crane, Indiana, 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 the March 4, 2008 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we DISMISS the petition as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 On February 6, 2008, the appellant filed an appeal, alleging that he was not selected for the WG-6501-05 Explosives Handler position under vacancy announcement number NCBG07125299D, that he was entitled to veterans'

preference, and that the agency committed prohibited personnel practices. Initial Appeal File (IAF), Tab 1 at 1, 5, 7. The administrative judge issued an Acknowledgment Order, explaining that the Board generally does not have jurisdiction over a claim regarding nonselection for a position and that the appellant has the burden of proving jurisdiction over the appeal, and ordering the appellant “to file evidence and argument to prove that this action is within the Board’s jurisdiction.” IAF, Tab 2 at 2. The appellant did not respond to the Acknowledgment Order. The agency submitted a copy of its file. IAF, Tab 3.

¶3 On March 4, 2008, the administrative judge issued an initial decision, which dismissed the appeal for lack of jurisdiction. IAF, Tab 4. The initial decision noted that it would become final on April 8, 2008, unless a petition for review was filed by that date. *Id.* at 3.

¶4 On November 11, 2009, the appellant filed an initial appeal form with the Board’s Central Regional Office, which forwarded it to the Office of the Clerk of the Board (OCB). In it, he asked the Board to reopen his appeal and designated a representative. Petition for Review (PFR) File, Tab 1 at 1, 5, 7. OCB construed this submission as a petition for review of the March 4, 2008 initial decision. PFR File, Tabs 1, 2 at 1. On November 16, 2009, OCB notified the appellant that his petition was untimely filed and advised him that the Board’s regulations required him to file a motion to accept the filing as timely and/or to waive the time limit for good cause. PFR File, Tab 2 at 1. OCB further advised the appellant that such a motion should include a statement signed under penalty of perjury or an affidavit showing that the petition for review was timely filed or that there was good cause for the late filing. *Id.* at 2. Finally, OCB included a “Motion to Accept Filing as Timely or to Waive Time Limit” form and informed the appellant that his “motion and properly signed statement must be postmarked if mailed or sent by facsimile on or before December 1, 2009.” *Id.* (emphasis in original); *see id.* at 6-7 (motion).

¶5 The appellant filed an additional submission, which included an October 26, 2009 letter from the Department of Labor, Veterans' Employment and Training Service, indicating that it was unable to reopen the appellant's January 4, 2008 veterans' preference complaint (which it had previously closed because it determined that the appellant's veterans' preference was "appropriately applied"), and another Designation of Representative form. PFR File, Tab 3 at 3-4, 6. The appellant's submission did not respond in any way to OCB's notice regarding the untimeliness of his petition for review. The agency filed a response to the petition. PFR File, Tab 4.

¶6 Because there were two irregularities in the treatment of the appellant's November 11, 2009 submission,* on March 11, 2010, the Board issued an Order, which was served on the appellant and his representative by electronic mail and on the agency via U.S. Mail, and which gave the appellant and his representative an additional 15 days to respond to OCB's November 16, 2009 notice. PFR File, Tab 5 at 1-2. However, neither the appellant, nor his representative, filed any response to this Order.

ANALYSIS

¶7 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 he received the initial decision more than 5 days after it was issued, within 30 days after the date it was received. [5 C.F.R. § 1201.114\(d\)](#). Here, the initial decision was issued on March 4, 2008, and it stated that it would become final on April 8, 2008, unless a

* It was unclear whether the Central Regional Office served a copy of its action referring the appellant's November 11, 2009 submission to OCB on all participants, including the appellant's representative. Additionally, although the Clerk of the Board properly served the November 16, 2009 notice on the appellant electronically, he served the notice on the appellant's representative by U.S. Mail; however, both individuals should have been served electronically, as they had both opted to receive service by electronic means. PFR File, Tab 5 at 1-2; *see* PFR File, Tabs 1 at 7, 3 at 6.

petition for review was filed by that date. IAF, Tab 4 at 3. The appellant does not allege that he received the initial decision more than 5 days after its issuance date, and he did not file his petition for review until November 11, 2009. PFR File, Tabs 1, 3. Thus, the petition for review was filed 19 months late.

¶8 The Board will waive its time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. § 1201.114\(f\)](#). To establish good cause for the untimely filing of a petition for review, the appellant 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 for review. *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).

¶9 The appellant was *pro se* below, but he was represented on petition for review. Moreover, the Board has held that a 15-month delay is significant. *Smith v. Department of the Army*, [110 M.S.P.R. 50](#), ¶ 10 (2008). Finally, the appellant did not provide any explanation for the 19-month delay in filing his petition for review, despite OCB's notice regarding its apparent untimeliness. For the foregoing reasons, we DISMISS the petition for review as untimely filed with no showing of good cause for the delay. *See* [5 C.F.R. § 1201.114\(f\)](#).

¶10 We also deny the appellant's request, made in his November 11, 2009 submission, to reopen his appeal. *See* PFR File, Tab 1 at 5. Under [5 C.F.R. § 1201.118](#), the Board "may reopen an appeal and reconsider a decision of a judge on its own motion at any time" In *Dean v. U.S. Postal Service*, [101 M.S.P.R. 356](#), ¶ 13 (2006) (internal citations omitted), the Board held that its

authority to reopen an appeal “is limited by the requirement that such authority be exercised within a reasonably short period of time,” usually measured in weeks, not years. Because the appellant’s request to reopen his appeal was filed 19 months after the initial decision became final, we conclude that the request was not made within a reasonably short period of time, we decline to exercise our discretionary authority under 5 C.F.R. § 1201.118, and we deny his request to reopen this appeal. *See Dean*, [101 M.S.P.R. 356](#), ¶¶ 13-14.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review and the request to reopen. The initial decision will remain the final decision of the Board with regard to the dismissal of the appeal for lack of jurisdiction. 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.