UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 157

Docket No. NY-0752-08-0259-I-1

Ernest Gerald, Jr.,

Appellant,

v.

Department of the Treasury,

Agency.

July 29, 2010

Ernest Gerald, Jr., Rosedale, New York, pro se.

Alexis Buckhannon, Esquire, 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 the initial decision dismissing his appeal as untimely filed. For the reasons set forth below, we DISMISS the petition for review as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 On August 7, 2002, the agency issued a decision notice removing the appellant, effective August 13, 2002, for his physical inability to perform the duties of his position. Initial Appeal File (IAF), Tab 1 at 9-11. The decision

letter notified the appellant of his right to file an appeal with the Board as well as the time limit and place for filing an appeal. *Id.* at 10.

¶3 The appellant filed an appeal with the Board on June 3, 2008. *Id.* at 2. On his appeal form, the appellant stated that he received the agency's decision letter on August 9, 2002. *Id.* In response to an order to show cause issued by the administrative judge, *see* IAF, Tab 3 at 2-3, the appellant asserted that he delayed filing his appeal because he did not learn until May 2008 that there were coding errors on the SF-50 effecting his removal, *see* IAF, Tab 10 at 2. In a July 8, 2008 initial decision, the administrative judge dismissed the appeal as untimely filed without good cause shown for the filing delay. *Id.* at 2. He found that the appeal was over 5 years late. *Id.* at 2-3. He further found that the appellant failed to demonstrate that he exercised ordinary prudence or due diligence in filing his appeal with the Board. *Id.* at 5.

ANALYSIS

¶4 A petition for review must be filed within 35 days after the date of issuance of the initial decision, 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 of receipt. *Williams v. Office of Personnel Management*, 109 M.S.P.R. 237, ¶ 7 (2008); 5 C.F.R. § 1201.114(d). Here, the initial decision was issued on July 8, 2008, and informed the appellant that, to be timely, a petition for review had to be filed on or before August 12, 2008. Initial Decision at 1, 6. The appellant filed his petition for review on March 6, 2010. *See* Petition for Review (PFR) File, Tab 1 at 23. Thus, the petition for review was filed almost 19 months late.

¶5 The Board will waive the filing deadline for a petition for review only upon a showing of good cause for the delay in filing. *Lawson v. Department of Homeland Security*, 102 M.S.P.R. 185, ¶ 5 (2006); 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the 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). Factors that are considered in the determination of good cause include the length of the delay, the reasonableness of the excuse and showing of due diligence, whether the appellant 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 that similarly shows a causal relationship to his inability to file his petition in a timely manner. *Wyeroski v. Department of Transportation*, 106 M.S.P.R. 7, ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶6 Because his petition appeared untimely, the Clerk of the Board issued an acknowledgment letter, affording the appellant an opportunity to submit proof that his petition was filed on time or was filed late with good cause. PFR File, Tab 2 at 1-2. In response, the appellant submitted a motion to waive the time limit for good cause shown, essentially repeating the same arguments he made below to excuse his untimely appeal. *See id.*, Tab 3 at 3-4; IAF, Tab 10 at 1-2. Specifically, in his motion, the appellant asserts that the agency attempted to prevent him from exercising his Board appeal rights by filing documents "that were specifically designed to conceal the fact that [the agency] removed [him] for conduct reasons while using documentation that indicated [he] was removed for physical inability to perform . . . ." PFR File, Tab 3 at 4. He thus asserts that he has "not had the fair opportunity to respond or answer removal charges of [c]onduct" with which he was officially charged. *Id.*

¶7 In his motion, the appellant fails to address the nearly 19-month delay in filing his petition for review of the initial decision. Although the appellant is acting pro se, the filing delay of 19 months is significant, and he has not demonstrated that he exercised due diligence or ordinary prudence that would justify waiving the deadline for filing a petition for review. *See Gulley v. Department of the Treasury*, 101 M.S.P.R. 48, ¶ 9 (2006) (noting that a delay of 4 months in filing a petition for review is hardly minimal, even when the appellant

is pro se). Indeed, the appellant fails to provide any explanation whatsoever as to why he waited nearly 19 months to file his petition. None of the arguments and assertions made by the appellant in his motion to waive the time limit suggests the existence of circumstances beyond his control that affected his ability to timely file his petition. *See Wyeroski*, 106 M.S.P.R. 7, ¶ 7.

¶8 We find that the appellant has failed to show that he exercised the due diligence or ordinary prudence in this case that would justify waiving the filing deadline. Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board regarding the timeliness 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.