UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 186

Docket No. AT-0351-10-0334-I-1

Richard Martinez,

Appellant,

v.

Broadcasting Board of Governors,

Agency.

September 10, 2010

Richard Martinez, Weston, Florida, pro se.

Elizabeth A. Parish, 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 of his separation by reduction in force (RIF) for lack of jurisdiction. For the reasons set forth below, we DISMISS the petition for review as untimely filed by 55 days without a showing of good cause for the filing delay.

BACKGROUND

¶2 The appellant was employed by the agency as a Television Broadcast Technician. Initial Appeal File (IAF), Tab 5, Exhibit (Ex.) 1. He was separated due to a RIF effective December 19, 2009. *Id.*, Exs. 1, 3.

¶3 This appeal followed. IAF, Tab 1. On February 9, 2010, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 6, Initial Decision (ID) at 1. The initial decision informed the appellant that the decision would become final on March 16, 2010, unless a petition for review was filed by that date or if the Board reopened the case on its own motion. *Id.* at 3.

¶4 On May 10, 2010, the appellant electronically filed a pro se petition for review. Petition for Review (PFR) File, Tab 1. The online interview section of the electronic petition for review informed the appellant that his petition was untimely filed; it informed him that the Board would consider the merits of his petition for review only if he established good cause for the untimely filing; and it specified the factors the Board considers in determining whether good cause has been shown. *Id.* at 3. The appellant indicated in response that he was unaware of the deadline for filing his petition for review because he did not receive the initial decision and he was unaware that he could monitor the status of his appeal through the Board's public website. *Id.*

ANALYSIS

¶5 A petition for review must be filed within 35 days after the issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. 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 We reject the appellant's suggestion on review that he did not receive the initial decision. The appellant registered as an e-filer, and thereby consented to accept all pleadings filed by other registered e-filers, and all documents issued by the Board, in electronic form. IAF, Tab 1 at 2; *see* 5 C.F.R. § 1201.14(e) and

(j)(1). The Board's e-Appeal Online Document Distribution Log indicates that on February 9, 2010, notice of the initial decision was sent to the appellant's e-mail address of record. Moreover, under 5 C.F.R. § 1201.14(m)(2), "MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission." When a law or regulation "deems" something to have been done, the event is considered to have occurred whether or not it actually did. *Terrell v. U.S. Postal Service*, 114 M.S.P.R. 38, ¶ 8 (2010). We therefore deem the appellant to have electronically received the initial decision on February 9, 2010.

¶7 The initial decision clearly apprised the appellant of the March 16, 2010 deadline to file a petition for review. ID at 3. However, the appellant did not file a petition for review until May 10, 2010, 55 days after the deadline date. *See* PFR File, Tab 1. Thus, we find that the appellant filed his petition for review 55 days late.

¶8 The Board may grant or deny the waiver of a time limit for filing a petition for review, 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).

¶9 The appellant states on review that he was unaware that he could monitor the status of his appeal through the Board's public website, and because he received a copy of an agency submission through the U.S. mail, he expected the Board to send a copy of the initial decision to him by U.S. mail. PFR File, Tab 1 at 3. Such an expectation was not reasonable. The Board's e-filing regulation provides that paper copies of MSPB documents issued to the parties "will not ordinarily be served on e-filers." 5 C.F.R. § 1201.14(j)(1); *see Terrell*, 114 M.S.P.R. 38, ¶ 7 n.2. In this regard, we note that the administrative judge's January 21, 2010 acknowledgment order was also served by sending it to the appellant's e-mail address of record. IAF, Tab 2 at 17-18. Consequently, we find that the appellant should reasonably have expected the initial decision to be served on him electronically and that he did not fulfill his obligation under 5 C.F.R. § 1201.14(j)(3) to monitor the case activity at the e-Appeal Online Repository.

¶10 The appellant presents no further explanation for the filing delay, and no evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits. A 55-day delay is significant. *See Terrell*, 114 M.S.P.R. 38, ¶ 9 (finding that a 42-day delay is significant). Despite the fact that the appellant is proceeding pro se, we find that he failed to show that he exercised due diligence or ordinary prudence in this case that would justify waiving the filing deadline. *See Smith*, 105 M.S.P.R. 433, ¶ 5; *Alonzo*, 4 M.S.P.R. at 184.

¶11 We therefore DISMISS the appeal as untimely filed by 55 days without a showing of good cause for the filing delay.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision remains the final

decision of the Board regarding Board jurisdiction over 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.