

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

2010 MSPB 191

Docket No. DE-0831-09-0408-I-1

**Veronica Via,
Appellant,**

v.

**Office of Personnel Management,
Agency,**

and

**Gerald L. Via
Intervenor.**

September 15, 2010

Stephen E. Hosford, Esquire, Arrey, New Mexico, for the appellant.

Roxann Johnson, Washington, D.C., for the agency.

Gerald L. Via, Las Cruces, New Mexico, pro se.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The intervenor petitions for review of the initial decision that reversed the Office of Personnel Management's (OPM's) reconsideration decision denying the appellant a portion of intervenor's federal annuity. For the reasons set forth below, we DISMISS the petition for review as untimely filed without a showing

of good cause for the delay. We also FORWARD the intervenor's response to the acknowledgment letter to the Denver Field Office for docketing as a timely-filed petition for enforcement.

BACKGROUND

¶2 The appellant and her husband, Gerald L. Via, a federal employee, divorced in 2000. Initial Appeal File (IAF), Tab 10, Exhibit 9. Via retired in 2004 and the appellant applied for a portion of his annuity. IAF, Tab 11, Subtab 6. After complicated proceedings that are not relevant to this appeal, OPM issued a reconsideration decision finding that it could not process the court order in the divorce proceedings between the appellant and Via that divided his federal annuity. IAF, Tab 11, Subtab 2. The appellant appealed OPM's decision and Via intervened as one who will be affected directly by the outcome of the proceeding, [5 C.F.R. § 1201.34\(c\)\(2\)](#), becoming a party to the appeal. Based on the record developed by the parties, the administrative judge issued an initial decision on January 8, 2010, that reversed the reconsideration decision, ordered OPM to pay the appellant a portion of the intervenor's annuity, and remanded to OPM to decide the issue of whether, under the court order giving a portion of the intervenor's annuity to the appellant, the appellant was entitled to cost-of-living allowances (COLAs). IAF, Tab 18. In the initial decision, the administrative judge informed the parties that it would become final on February 12, 2010, unless one of the parties filed a petition for review. *Id.*

¶3 The intervenor filed a petition for review on July 7, 2010. Petition for Review (PFR) File, Tab 1. The Office of the Clerk of the Board issued an acknowledgment letter notifying the intervenor that his petition appeared untimely and allowing him to file a motion to accept it as timely or to waive the time limit for good cause shown. *Id.*, Tab 2. The intervenor responded to the Clerk's acknowledgment order, essentially alleging that OPM has failed to

comply with the Board's decision. PFR File, Tab 4. The agency has not responded to the petition.

ANALYSIS

¶4 A petition for review must be filed within 35 days after the date of issuance of the initial decision, or, if a party 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, as noted, the initial decision was issued on January 8, 2010, and informed the parties, including the intervenor, that, to be timely, a petition for review had to be filed on or before February 12, 2010. IAF, Tab 18. As also noted, the intervenor filed his petition for review on July 7, 2010. See PFR File, Tab 1. Thus, as the intervenor does not allege that he received the initial decision more than 5 days after it was issued, he filed the petition for review almost 5 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. *Wyerowski v. Department of Transportation*, [106 M.S.P.R. 7](#), ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶6 In his response to the acknowledgment letter, the intervenor explains that he has not received any notification about how OPM is going to proceed with compliance with the initial decision. PFR File, Tab 4. He states that the reason that he did not ask the Board for an extension of time to file a petition for review before the deadline is that he has not received notification of a timely decision from OPM. *Id.* He indicates that he read the initial decision as informing him that he only has a right to file a petition for review after OPM issues its decision regarding the application of COLAs to the appellant's portion of the intervenor's annuity. *Id.*

¶7 Here, notwithstanding the intervenor's pro se status, his delay in filing a petition for review is lengthy, and he has not shown that he exercised due diligence or ordinary prudence under the circumstances of this case. Misinterpretation or misreading of the filing deadline where, as here, the initial decision informs the party of the deadline for filing a petition for review and the proper address for the Clerk of the Board, does not show that the party exercised the due diligence or ordinary prudence required. *See White v. Department of the Navy*, [55 M.S.P.R. 376](#), 378 (1992); *Mata v. Department of the Army*, [43 M.S.P.R. 250](#), 252-53 (1990). We find that the intervenor has failed to show that he exercised the due diligence or ordinary prudence in this case that would justify waiving the filing deadline. Thus, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing.

¶8 The intervenor's response to the acknowledgment letter appears also to be a petition for enforcement. In it he quotes the language in the initial decision that ordered OPM to issue, within 20 calendar days after the Board's decision became final on February 12, 2010, its decision on whether the appellant is entitled to COLAs under the divorce court order giving a portion of the intervenor's federal annuity to the appellant and indicates that OPM has not notified him of its decision. PFR File, Tab 4. He also recounts his efforts to contact OPM regarding its action pursuant to the order. *Id.* It is well settled that allegations of

noncompliance should be heard in the first instance by the administrative judge. *Rivera v. U.S. Postal Service*, [107 M.S.P.R. 542](#), ¶ 10 (2007); *Owen v. U.S. Postal Service*, [87 M.S.P.R. 449](#), ¶ 9 (2000). Accordingly, we FORWARD the intervenor's apparent allegations of noncompliance to the administrative judge as a timely filed petition for enforcement.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board regarding the timeliness of the petition for review. The initial decision will remain the final decision of the Board. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT and the intervenor 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.