

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

SANDRA A. MAY,
Appellant,

DOCKET NUMBER
SF-0752-11-0701-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 22, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Sandra A. May, Kihei, Hawaii, pro se.

Bobbi Mihal, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The agency removed the appellant for violating the terms of a last-chance agreement that the parties executed in order to settle a prior removal appeal, MSPB Docket No. SF-0752-10-0384-I-1. Initial Appeal File (IAF), Tab 7 at 12-14, 57-60. The appellant appealed, and the agency moved to dismiss the appeal as untimely filed. IAF, Tab 1; Tab 7 at 5-6. The administrative judge ordered the appellant to file evidence and argument to establish that she either timely filed her appeal or that good cause exists for her delay in filing. IAF, Tab 8. The appellant did not respond, and the administrative judge issued an August 26, 2011 initial decision in which he dismissed the instant appeal as untimely filed. IAF, Tab 10, Initial Decision (ID).

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 she received the initial decision more than 5 days after it was issued, within 30 days after the date of receipt. *E.g., Via v. Office of Personnel Management*, [114 M.S.P.R. 632](#), ¶ 4 (2010); [5 C.F.R. § 1201.114](#)(d). The appellant filed her petition for review on November 9, 2011, 75 days after the issuance of the initial decision and 40 days after the initial decision became final. Petition for Review (PFR) File, Tab 1; *see* ID at 7; *see also* [5 C.F.R. § 1201.114](#)(d). She does not claim that she received the initial decision more than 5 days after it was issued.

The Board will waive the filing deadline for a petition for review only upon a showing of good cause for the delay in filing. *E.g., 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 an untimely filing, a party must show that she 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 she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune that similarly shows a causal relationship to her inability to file her petition in a timely manner. *Wyerski v. Department of Transportation*, [106 M.S.P.R. 7](#), ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

The appellant includes with her petition for review the required motion to establish good cause for her delay in filing. PFR File, Tab 1 at 14, 18-19; *see* [5 C.F.R. § 1201.114\(f\)](#). In her motion, the appellant asserts that she has a limited, fixed income which is insufficient to meet her obligations. PFR File, Tab 1 at 18. She also requests the Board to give her an extension of time. *Id.* Elsewhere in her petition for review, the appellant claims that it took her from about July 26, 2011, to assemble her petition for review. *Id.* at 14. In a supplement filed after the close of the record on review, the appellant also asserts that she had serious dental problems from November 10, through December 9, 2011. PFR File, Tab 6, Subtab A at 1; *see* PFR File, Tab 2; *see also* [5 C.F.R. § 1201.114\(i\)](#).

A motion for an extension of time in which to file a petition for review must be filed with the Clerk of the Board before the date on which the petition is due. [5 C.F.R. § 1201.114\(e\)](#). The appellant's failure to do so precludes our granting her request for such an extension and further shows a lack of due diligence on her part. *Id.*; *see Youngblood v. U.S. Postal Service*, [112 M.S.P.R. 136](#), ¶ 10 (2009). To the extent that the appellant suggests that her delay was caused by her difficulties in gathering the documents she submits with her petition, PFR File, Tab 1 at 14, the discovery of new evidence may establish good cause for the untimely filing of a PFR if the evidence contained therein was not readily available before the record closed below, *e.g.*, *Johnson v. Department of the Air Force*, [106 M.S.P.R. 319](#), ¶ 9 (2007). In this case, some of the documents

the appellant submits with her petition for review date from after the close of the record below; these include medical records as well as documents related to her application for Social Security disability benefits and the foreclosure of her home. *E.g.*, PFR File, Tabs 13, 9, 6. Nevertheless, these documents are not pertinent to the timeliness of the appellant's petition for review. The documents either pertain to the merits of the appellant's claim, or to matters like the appellant's dental problem, which occurred after the close of the record on review, and therefore could not have affected the appellant's ability to file her petition for review in a timely fashion. The remaining documents accompanying the appellant's petition for review date from before the close of the record below, and the appellant fails to allege that any of these documents were unavailable despite her due diligence when the record closed. Thus, delaying the filing of the petition for review in order to collect this documentation does not constitute good cause to excuse the delay in this case. *E.g.*, *Smith v. Department of the Army*, [110 M.S.P.R. 50](#), ¶ 13 (2008). Lastly, the appellant's apparent assertion that she lacked the financial wherewithal to file her petition for review, even if true, does not provide good cause for the untimely filing of her petition for review. *Cf.*, *Lawson v. Department of Homeland Security*, [102 M.S.P.R. 185](#), ¶ 6 (2006) (the appellant's inability to afford the cost of an attorney to pursue her petition for review did not constitute good cause for the delay in filing).

Thus, because the appellant failed to establish good cause for her delay in filing, we DISMISS her petition for review as untimely filed. *E.g.*, *Smith v. Department of the Army*, [105 M.S.P.R. 433](#), ¶¶ 6-7 (2007); *Pangelinan v. Department of Homeland Security*, [104 M.S.P.R. 108](#), ¶ 9 (2006).

ORDER

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

decision of the Board in this 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**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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.