

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

JAMES HEGARTY,
Appellant,

DOCKET NUMBER
SF-0731-01-0414-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: September 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

James Hegarty, Tracys Landing, Maryland, pro se.

Lauren J. Barefoot, San Diego, 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 of the December 6, 2001 initial decision that dismissed his appeal as settled. The appellant also filed an untimely Motion to Accept Filing as Timely and/or to Ask the Board to Waive or

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

Set Aside the Time Limit. For the reasons set forth below, we DENY the Motion and we DISMISS the petition as untimely filed without a showing of good cause for the delay.

On May 19, 2001, the appellant filed an appeal of the agency's withdrawal of its offer of employment for the position of Border Patrol Agent (Trainee) based on a determination that he was not suitable for the position. Initial Appeal File (IAF), Tab 1. In a December 6, 2001 initial decision, the administrative judge dismissed the appeal as settled. IAF, Tab 17. In the initial decision, the administrative judge informed the appellant of the finality date, January 10, 2002, and provided him with the address of the Clerk of the Board in the event that he wished to file a petition for review. *Id.* at 2-3. Because neither party filed a petition for review prior to January 10, 2002, the initial decision became the Board's final decision.

On April 16, 2012, the appellant filed a submission, which was docketed as a petition for review. Petition for Review (PFR) File, Tab 1. The Office of the Clerk of the Board issued a letter, which informed the appellant that it appeared that his petition was untimely filed, advised him of his burden of proof to establish timeliness, provided him with a "Motion to Accept Filing as Timely or to Waive Time Limit" form, and explained that the Motion and a properly signed statement "must be postmarked if mailed or sent by facsimile on or before May 11, 2012." PFR File, Tab 2 (emphasis in original). The appellant electronically filed his Motion on May 18, 2012, one week after this deadline. *See* PFR File, Tab 3. The agency filed a response to the petition for review. *See* PFR File, Tab 4.

The Board's regulations provide that a petition for review must be filed within 35 days of the issuance of an initial decision. *See* [5 C.F.R. § 1201.114](#)(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. §§ 1201.12](#), .114(f). 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. *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. *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). The length of the delay is a consideration in every good cause determination. *Walls v. Merit Systems Protection Board*, [29 F.3d 1578](#), 1582 (Fed. Cir. 1994).

Here, the appellant, who is pro se, filed his petition for review with the Board over 10 years after the initial decision became final. This is a significant delay. *See, e.g., Brockman v. Department of Defense*, [108 M.S.P.R. 490](#), ¶ 8 (2008) (concluding that a 9-year delay in filing a petition for review was “significant”). Moreover, despite being given notice of the requirements and deadline for filing a Motion to Waive the Time Limit and/or to Ask the Board to Waive or Set Aside the Time Limit, the appellant filed the Motion one week late, without any explanation for its untimeliness. We therefore DENY his Motion, we do not consider it in our analysis, and we conclude that he has failed to show that he exercised due diligence or ordinary prudence in this case that would justify waiving the filing deadline. *See Alonzo*, 4 M.S.P.R. at 184. For these reasons, we DISMISS the petition for review as untimely filed with no showing of good cause for the delay. [5 C.F.R. § 1201.114\(f\)](#).

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 with regard to the disposition of the underlying 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.