UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 112

Docket No. DC-1221-10-0875-W-1

John A. Stolarczyk,

Appellant,

v.

Department of Homeland Security,

Agency.

September 26, 2012

Nicholas Woodfield, Esquire, and R. Scott Oswald, Esquire, Washington, D.C., for the appellant.

Michael W. Gaches, Esquire, Arlington, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the April 22, 2011 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we REVERSE the initial decision and REMAND this appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On October 12, 2008, the agency appointed the appellant to the position of Deputy Director of the Business Management Office (BMO) of the Transportation

Security Administration's Office of Global Strategies. Initial Appeal File (IAF), Tab 8, Subtab 4A. On October 7, 2009, it separated the appellant from his position. The appellant subsequently filed a complaint with the Office of Special Counsel (OSC), wherein he alleged that he was terminated during his probationary or trial period on October 7, 2009, for reasons which were false and a pretext for whistleblower reprisal. IAF, Tab 1, Exhibit (Ex.) 1 at 12. He further alleged that agency management placed him on administrative leave on October 6, 2009, and informed him that he had 3 days to resign and avoid a blemish on his record for being terminated. Even though the appellant submitted his resignation on October 7, 2009, the agency issued him a letter that same day, terminating his employment, and ordered security guards to immediately escort him from the building. *Id.* at 34-35. The appellant's requested remedy in his OSC complaint was reinstatement to his position or an equivalent position, back pay, and other damages. *Id.*, Ex. 1 at 8.

¶3 After exhausting his remedy with OSC, the appellant filed an individual right of action (IRA) appeal with the Board in which he alleged violations of the Whistleblower Protection Act (WPA) and the Uniformed Services Employment and Reemployment Act (USERRA) of 1994, 38 U.S.C. § 4301(a).[1] IAF, Tab 1 at 9-10, 32-41. In particular, he reiterated his claims that the agency demoted, failed to promote, and terminated him during his trial period in reprisal for whistleblowing. *Id.* at 38-39. He specifically alleged that he made protected disclosures under the WPA when he: (1) reported two employees' improper "P-card" purchases to his supervisors, which he believed constituted a violation of law, rule, or regulation and a substantial and specific danger to public safety; and (2) reported to his second- and third-line supervisors his belief that his first-

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[1] As noted by the administrative judge, the appellant's USERRA claim was docketed as a separate appeal. IAF, Tab 32, Initial Decision at 5 n.3; *see Stolarcyzk v. Department of Homeland Security*, MSPB Docket No. DC-4324-10-0892-I-1, Initial Decision (Jan. 12, 2011).

line supervisor abused her authority when she decided not to discipline these two employees. *Id*. at 40-43. The administrative judge issued an order setting forth the appellant's burden for establishing jurisdiction over an IRA appeal and ordering him to submit evidence and argument establishing the Board's jurisdiction. IAF, Tab 22 at 3-8.

¶4 After affording the parties the opportunity to respond to his jurisdictional order, the administrative judge issued an April 22, 2011 initial decision dismissing the appellant's IRA appeal for lack of jurisdiction. IAF, Tab 32, Initial Decision (ID) at 1, 16. The administrative judge found that, although the appellant had exhausted his administrative remedies before OSC prior to filing his Board appeal, he failed to raise a nonfrivolous allegation that he made a protected disclosure of a violation of law, rule, or regulation, an abuse of authority, or a substantial and specific danger to public health and safety, as set forth in 5 U.S.C. § 2302(b)(8). *Id*. at 5, 8-9.

¶5 In pertinent part, the administrative judge found that the appellant failed to make a protected disclosure because the appellant's disclosures regarding two employees' improper use of a P-card (purchase card) were made as part of the appellant's normal and required duties and through normal channels. *Id*. at 10-11; *see Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001). The initial decision, which became final on May 27, 2011, informed the appellant of that finality date and provided him with the address of the Clerk of the Board in the event he wished to file a petition for review. *Id*. at 16-17.

¶6 The appellant filed a petition for review on June 21, 2011. Petition for Review (PFR) File, Tab 2. The following day, the appellant filed a "Motion to Waive Time Limitation." [2] PFR File, Tab 3. The agency has filed a motion to

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[2] The appellant subsequently filed two other motions. PFR File, Tabs 5, 9. The Board's regulations do not provide for submissions beyond the petition for review and response to the petition. *Sparrow v. Department of the Navy*, 26 M.S.P.R. 335, 336 n.* (1985).

strike the appellant's petition for review as untimely and a response to the appellant's petition for review. PFR File, Tabs 4, 7.

ANALYSIS

The appellant timely filed his petition for review.

¶7 The Board's regulations provide that, generally, a petition for review must be filed within 35 days of the issuance of an 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 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).

¶8 Here, the appellant filed his petition for review with the Board nearly a month after the date the initial decision became final. PFR File, Tab 2; ID at 16. In his motion to waive the time limit, the appellant argues that the filing delay was due to an error by a courier that caused the petition to be delivered to OSC

Accordingly, we have not considered the motions the appellant filed after the agency filed a response.

rather than to the Board. PFR File, Tab 3 at 1-2. Specifically, the appellant asserts without dispute that the courier was instructed to deliver the petition to the Clerk of the Board but that he mistakenly filed the petition with OSC on May 25, 2011, and represented that the filing had been properly made.[3] *Id*.

¶9 The Board has previously held that relying on a courier service to mail or deliver the petition for review does not establish good cause for any delay and does not demonstrate that the appellant's representative acted with due diligence or ordinary prudence in ensuring that the appellant's petition was timely filed. *Norman v. Department of the Army*, 56 M.S.P.R. 446, 448 (1993), *aff'd*, 34 F.3d 1080 (Fed. Cir. 1994) (Table); *Kubicki v. Department of the Treasury*, 47 M.S.P.R. 118, 120 (1991); *see Holland v. Department of the Air Force*, 51 M.S.P.R. 128, 131-32 (1991). When these cases were issued, however, Board regulations provided that a petition for review could be filed by only one of three methods - personal delivery, facsimile, or mail. *See Holland*, 51 M.S.P.R. at 129; 5 C.F.R. § 1201.114(c) (1993).

¶10 The Board amended its regulations in July 1993. 58 Fed. Reg. 36345-01 (July 7, 1993). The Board's regulations now specifically provide for service and filing of documents by commercial delivery, 5 C.F.R. § 1201.114(c) (2011), and define the date of filing by commercial delivery as the date the document is delivered to the commercial delivery service, 5 C.F.R. § 1201.4(l) (2011). In

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[3] The appellant further asserts on review that the Board should find good cause for his filing delay because OSC is an office of the Board and "a filing with the wrong Board office is considered filed with the appropriate office on the date the incorrect office received it, as a matter of law." PFR File, Tab 5 at 1-2. However, while the appellant correctly notes that the Board has held that filing with OSC is filing with the Board, albeit the wrong Board office for filing a petition for review, *see Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 315-16 (1984), OSC has since become an agency independent from the Board, *see* 5 U.S.C. § 1211. The Board has held that misdirection of an appeal to an organization that is not affiliated with the Board does not in itself constitute good cause for late filing. *Story v. Department of the Air Force*, 55 M.S.P.R. 222, 226 n.4 (1992).

amending its regulations, the Board expressed the need to conform its regulations to actual and accepted practice, thereby demonstrating an increased acceptance of commercial delivery as a method for filing written submissions. *See* 58 Fed. Reg. 36345-01. Thus, to the extent that previous Board cases have held that relying on a courier service to file a written submission may not establish good cause for a filing delay, they are overruled.

¶11 In the instant case, the appellant gave the petition for review to the courier in a timely manner. The appellant's representative states in an affidavit that he instructed the courier to deliver the appellant's petition to the Clerk of the Board, but that the courier mistakenly filed the petition with OSC and represented that the filing had been properly made. PFR File, Tab 3 at 9-10. The appellant's arguments in this copy of his petition, which appears to be identical to the one he later hand-delivered to the Board, are directed to the Board, and not to OSC. PFR File, Tab 2 at 1-14, Tab 3 at 13-26. Because the date the appellant delivered the petition for review to the courier constitutes the date of filing, the appellant's petition for review was timely filed. 5 C.F.R. § 1201.4(l).

¶12 Accordingly, in light of the circumstances described above, we find that the appellant timely filed his petition for review.[4]

The appellant has made a nonfrivolous allegation that the agency terminated him.

¶13 As a threshold matter, we note that the administrative judge erroneously concluded that the appellant never argued that his resignation was an involuntary action and advised him that he might have a right to file a separate appeal of that action as a constructive discharge. ID at 4 n.2. Although the record reflects that

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[4] We also note that the appellant has shown that he exercised due diligence in filing his petition for review once he realized the courier's error. *See Alonzo*, 4 M.S.P.R. at 184. The appellant's representative states in his affidavit that he hand-delivered the appellant's petition to the Board the same day he learned from opposing counsel that the Board had no record of the appellant's petition being filed. *Id*. at 10-11. Additionally, the appellant submits a copy of his petition for review that is date stamped by OSC "May 25, 2011." *Id*. at 13-26.

the appellant submitted a letter of resignation, *see* IAF, Tab 8, Subtab 4F, his pleadings clearly contend that the agency terminated him during his trial period and not as a resignation in violation of 5 U.S.C. § 2302(b)(8). IAF, Tab 1 at 38-39. Specifically, the appellant alleges, and the record reflects, that the agency issued him a termination letter on the same day that he submitted a letter of resignation and that it had security officers escort him from the workplace. *Id* at 34-35. Thus, the appellant has made nonfrivolous allegations that the agency terminated him during his trial period. To the extent that there is a factual dispute regarding the nature of the appellant's separation from employment, the administrative judge will need to resolve this issue on the merits.[5]

The appellant has made a nonfrivolous allegation that his alleged disclosures were protected disclosures under 5 U.S.C. § 2302(b)(8).

¶14 In his petition for review, the appellant argues that the administrative judge erred in finding that his disclosures were made as part of his normal and required duties and through normal channels and thus were not protected under *Huffman*. He further asserts that the administrative judge improperly imposed an evidentiary burden in dismissing his claims for lack of jurisdiction when nonfrivolous allegations are sufficient to establish jurisdiction in this context. The appellant also maintains that the administrative judge failed to consider his jurisdictional submissions and improperly made credibility determinations in dismissing the appeal. PFR File, Tab 2 at 7-9.

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[5] As noted above, the appellant also claims that the agency demoted him, failed to select him for promotion, and subsequently failed to select him for another position after his termination in retaliation for whistleblowing. His nonfrivolous allegation that he was subjected to at least one personnel action, i.e., a probationary termination, is sufficient to establish the personnel action element of the IRA jurisdictional test. *See McCarty v. Environmental Protection Agency*, 108 M.S.P.R. 45, ¶ 13 n.3 (2008). Therefore, we need not decide for purposes of this Opinion and Order whether the other alleged personnel actions constitute personnel actions as well. If necessary, the administrative judge shall resolve these issues on remand.

¶15 The Board has jurisdiction over an IRA appeal if an appellant shows that he exhausted his administrative remedies before OSC and made nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002) (citing *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001)); IAF, Tab 22 at 3; ID at 4. To meet the nonfrivolous standard, an appellant need only plead allegations of fact which, if proven, could show that he made a protected disclosure and that the disclosure was a contributing factor. *See Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008); *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 18 (2010).

¶16 This issue turns on whether the appellant failed to make nonfrivolous allegations that his disclosures were excluded under *Huffman*, 263 F.3d 1341. In *Huffman*, the court outlined three categories into which a disclosure may fall, only the latter two of which constitute disclosures that are protected under the WPA: (1) disclosures made as part of normal duties through normal channels, (2) disclosures as part of normal duties outside of normal channels, and (3) disclosures outside of normal duties. *Id*. at 1353-54. In other words, the court held in *Huffman* that reports made as part of an employee's normal, assigned duties are not protected disclosures under the WPA when made through normal channels. *Id.* at 1352.

¶17 Below and on review, the appellant contends that his investigation of the improper P-card purchases fell into either the second or third *Huffman* categories. The court explained in *Huffman* that the second category involves the situation "in which an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels." 263 F.3d at 1354. An example of this category would be a law enforcement officer responsible for investigating crime by government employees who, feeling that the normal chain of command

is unresponsive, reports wrongdoing outside of normal channels. The third category involves the situation "in which the employee is obligated to report the wrongdoing, but such report is not part of the employee's normal duties or the employee has not been assigned those duties." *Id*. In making this statement, the court noted: "For example, the regulations, 5 C.F.R. § 2635.101(b)(11), specifically require all employees to 'disclose waste, fraud, abuse, and corruption to appropriate authorities.'" *Id*. at 1354 n.6. Therefore, a disclosure comes within the third category of *Huffman* if, although the employee, like all agency employees, is generally required to report wrongdoing that he or she sees, the disclosure is not part of the employee's assigned duties. *See Kahn*, 528 F.3d at 1341-42.

¶18 The appellant's primary arguments on jurisdiction are that his investigation of the P-card misuse was not made in the course of his normal job duties and that he was never assigned to perform such an investigation. IAF, Tab 23 at 2-6. The record shows that, as Deputy Director, the appellant was responsible for assisting the BMO Director with managing the Office of Global Strategies' payroll, travel, budget, and other administrative responsibilities, including assisting other employees accountable for the agency's rules and regulations. IAF, Tab 14, Ex. 2. However, the appellant alleged that the typical, normal duties of a Deputy Director in BMO did not include any authority to conduct an investigation into employee misuse of P-cards and that the agency's policy specifically assigned oversight and investigation of P-card misuse to other individuals. *Id.*, Tab 23 at 4. He supported this allegation, in part, with the deposition testimony of a co-worker, another BMO Deputy Director, who testified that it was not part of the job responsibilities of Deputy Directors in BMO to perform an investigation of unauthorized use of a P-card. *Id.*, Ex. 2. Thus, the appellant presented below a specific factual allegation that the P-card investigation was not within his normal job duties, which is supported by more than just his unsubstantiated speculation. *See Kahn*, 528 F.3d at 1341.

¶19 The appellant also alleged below that he was not assigned to perform an "investigation" of P-card misuse. Rather, he asserted that the BMO Director only told him to gather facts about one employee's purchase of books using a P-card and that she later became angry and was displeased when she learned that he had conducted interviews, taken statements, and investigated a second employee involved in the P-card misuse. IAF, Tab 23 at 5. As part of his support for this allegation, the appellant cited to the BMO Director's emails, where she referred to his investigation as an "audit." The appellant, thus, made specific factual allegations below that he went beyond his assignment when he conducted the investigation, and, therefore, his investigation fell within *Huffman* category 3.

¶20 Furthermore, the appellant argues that, even if his investigation was deemed to be part of his assigned duties, his disclosures were still protected because they were made outside normal channels. IAF, Tab 23 at 6. Specifically, the appellant alleged that his disclosures to his second- and third-level supervisors violated the agency's chain of command. *Id.* at 6-7. In support of this allegation, he presented statements in which agency managers stated that they believed that the appellant's complaints to his second- and third-level supervisors were improper and made outside of the chain of command. *Id.*, Exs. 1, 8, 9; *see Farrington v. Department of Transportation*, 118 M.S.P.R. 331, ¶ 6 (2012) (the Board defined disclosures within "normal channels" under the *Huffman* to mean when an employee conveys duty-related information to a recipient, who, in the normal course of his or her duties, customarily receives the same type of information from the employee or from other employees at the same or similar level in the organization as the employee). Thus, the appellant presented specific, factual allegations below that his reports of the P-card misuse were viewed as being made outside normal channels of communication within the agency.

¶21 In the initial decision, the administrative judge determined that the appellant failed to make nonfrivolous allegations that his reports to agency management regarding the P-card misuse were protected disclosures because it

appeared that the appellant's actions were within the scope of his normal and required duties and were made within normal channels. In reaching this finding, the administrative judge noted the appellant's duties in his Job Analysis Tool, i.e., position description, and the appellant's acknowledgement in emails to the BMO Director that he was conducting the investigation. ID at 10. However, the administrative judge did not address the appellant's specific factual allegations, outlined above, that the investigation was not part of his normal or assigned duties and that some of his disclosures were not made through normal channels. Instead, the administrative judge rejected the appellant's allegations without explanation.

¶22 We find that the administrative judge erred in concluding that the appellant failed to make a nonfrivolous allegation of a protected disclosure under *Huffman*. The record shows that the appellant has presented sufficient, nonfrivolous allegations of fact that his reports concerning the P-card misuse were not part of his normal and assigned duties and that his reports were made outside of normal channels under *Huffman*.

The appellant has made a nonfrivolous allegation that his alleged protected disclosures were a contributing factor in a personnel action.

¶23 To satisfy the contributing factor criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect a personnel action in any way. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011). One way to establish this criterion is the knowledge-timing test, under which an employee may nonfrivolously allege that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Mason*, 116 M.S.P.R. 135, ¶ 26; *see* 5 U.S.C. § 1221(e)(1). Once the appellant

has made a nonfrivolous allegation that the knowledge-timing test has been met, he has met his jurisdictional burden with regard to the contributing factor criterion. *Mason*, 116 M.S.P.R. 135, ¶ 26.

¶24 The appellant has made nonfrivolous allegations that his alleged protected disclosures were a contributing factor in his termination from employment. The appellant alleged that he made disclosures relating to the P-card misuse to his second- and third-level supervisors on May 14, 2009. IAF, Tab 1, Ex. 1 at 26-27. Thereafter, in October 2009, his second-level supervisors informed him that he would be terminated during his trial period. Given the 5-month timeframe between the appellant's disclosures and his separation, we find that a reasonable person could conclude that the appellant's disclosures were a contributing factor under the knowledge–timing test in a personnel action within the meaning of 5 U.S.C. § 2302(a)(2)(A). *See Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 13, *aff'd*, 353 F. App'x 435 (Fed. Cir. 2009).

ORDER

¶25 Based on the foregoing, we REVERSE the initial decision and REMAND the appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

John A. Stolarczyk v. Department of Homeland Security

MSPB Docket No. DC-1221-10-0875-W-1

¶1 For the reasons given below, I would dismiss the appellant's petition for review as untimely filed with no good cause shown.

BACKGROUND

¶2 On April 22, 2011, the administrative judge issued an initial decision dismissing this appeal for lack of jurisdiction. In accordance with 5 C.F.R. § 1201.113, the decision stated that it would become final on May 27, 2011, if neither party filed a petition for review. Initial Appeal File, Tab 32. Because May 27, 2011, was a Sunday and May 28, 2011, was a federal holiday, the finality date was automatically extended to May 29, 2011. *See* 5 C.F.R. § 1201.23.

¶3 On June 21, 2011, the Board received the appellant's petition for review by hand delivery. Petition for Review (PFR) File, Tab 2. The appellant has filed a "Motion for Waiver of Time Limitation," accompanied by an affidavit from his attorney, Nicholas Woodfield, whose office is in Washington, D.C. Woodfield avers as follows: Woodfield prepared the petition for review and "dispatched a courier to file it on May 25, 2011"; "[t]he courier was instructed to deliver the petition to the Clerk of the Merit Systems Protection Board at 1615 M Street NW, in Washington, D.C."; "[t]he courier expressed familiarity with the Board's location and then departed"; "[t]he courier then filed the petition on the afternoon of May 25, 2011, and represented that the filing had been made properly"; on June 21, 2011, "opposing counsel" informed Woodfield that the Board had no record of a petition for review having been filed; upon investigation, Woodfield "learned that the courier had errantly filed the petition with the OSC [Office of

Special Counsel] instead of the MSPB"; and Woodfield "consulted with the courier, and in response to the query 'why did you not go to the MSPB,' the courier told [Woodfield] 'I thought they were the same thing.'" PFR File, Tab 3, Exhibit 1 at 2. OSC is located at 1730 M Street N.W., Washington, D.C. 5 C.F.R. § 1800.1(c)(5)(i). The agency argues that the petition for review should be dismissed. PFR File, Tab 4.

DISCUSSION

¶4 The majority applies 5 C.F.R. § 1201.4(l), which makes the date that a pleading is "delivered to [a] commercial delivery service" the date of filing with the Board, to find that the appellant filed his petition for review on May 25, 2011, within the deadline. The majority finds, in the alternative, that, if the petition for review is instead considered to have been filed on June 21, 2011, the appellant has shown good cause for his late filing.

¶5 I do not agree with the majority's finding that the appellant filed his petition for review by the deadline because the appellant's attorney does not allege that he used a commercial delivery service on May 25, 2011; he has not submitted a receipt, tracking slip, or other documentary evidence indicating that he used a commercial delivery service; and he does not argue that he made a timely filing under 5 C.F.R. § 1201.4(l) via commercial delivery service. Moreover, it seems highly unlikely that an employee of a commercial delivery service such as FedEx or DHL, or for that matter a bicycle messenger, would tell a customer that he thought that OSC and the Board "were the same thing." The more likely explanation is that the "courier" was an employee of Woodfield's law firm. The evidence does not support a different conclusion.

¶6 Indeed, in arguing for dismissal of the petition for review, the agency maintains that this case is "nearly identical" to one in which the Board dismissed a petition for review that was filed late because of a mistake by "the appellant's attorney's clerical staff." PFR File, Tab 4 at 2. The appellant has filed a detailed

reply to the agency's submission, but in that reply his attorney does *not* argue that this case is different because the mistake was made by a commercial delivery service rather than someone on his staff. Instead, he argues that his May 25, 2011 submission to OSC should be considered a timely filing because OSC is "an office of the Board," and, thus, "who" was responsible for delivering the petition for review to the Board "is irrelevant." PFR File, Tab 5 at 2. The majority rightly concludes, however, that OSC is not considered an office of the Board, and, as explained above, who actually delivered the petition for review to the Board is crucial to the question of whether there was a timely filing by "commercial delivery service." Again, the appellant does not argue that he made a timely filing by commercial delivery service under 5 C.F.R. § 1201.4(l), nor has he submitted any evidence to support a finding that he did.

¶7 I also do not agree with the majority's alternative finding that there is good cause for the late filing of the petition for review because, under Board case law, a mistake by an attorney's staff ordinarily does not excuse the attorney's failure to meet a filing deadline. *See Colon v. U.S. Postal Service*, 71 M.S.P.R. 514 (1996) (petition for review filed 27 days late dismissed as untimely; a mistake by a member of the attorney's staff, who sent the petition for review to the Court of Appeals for the Federal Circuit instead of the Board, did not constitute good cause); *Bane v. U.S. Postal Service*, 59 M.S.P.R. 13 (1993) (petition for review filed 2 days late dismissed as untimely; the attorney's mistaken belief that his secretary had filed the petition for review on time did not constitute good cause); *Freeman v. Office of Personnel Management*, 58 M.S.P.R. 337 (1993) (petition for review filed 3 days late dismissed as untimely; a "miscommunication" between an attorney and her staff did not constitute good cause).

¶8 I see no reason not to apply this case law here. The Board's records list Woodfield as counsel of record for an appellant in six previous cases in which a petition for review was filed. Woodfield thus knew or should have known that the Board routinely acknowledges the filing of a petition for review within days

of receipt. Having failed to receive such an acknowledgment within a reasonable time after May 25, 2011, Woodfield should have made inquiries. His failure to do so for almost a month was a lack of due diligence.

¶9 I respectfully dissent.

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Mark A. Robbins
Member