

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

ADAM CONTI,  
Appellant,

DOCKET NUMBER  
NY-0752-09-0041-I-1

v.

DEPARTMENT OF HOMELAND  
SECURITY,  
Agency.

DATE: December 10, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

David Restaino, Esquire, and Jeffrey M. Pollock, Esquire, Lawrenceville,  
New Jersey, for the appellant.

Carolyn D. Jones, Williston, Vermont, 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 initial decision that dismissed this appeal for lack of jurisdiction. For the reasons given below, we dismiss the petition for review as untimely filed with no good cause.

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

## DISCUSSION OF ARGUMENTS ON REVIEW

The appellant's petition for review was filed more than 2-1/2 years beyond the deadline. *See* Initial Appeal File (IAF), Tab 12, Initial Decision (ID) at 7; [5 C.F.R. § 1201.56\(a\)\(2\)\(ii\)](#)<sup>2</sup>; [5 C.F.R. § 1201.114\(d\), \(f\)](#).<sup>3</sup> 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). The Board has long held that the discovery of new evidence *may* constitute good cause for waiver of the filing deadline for the petition for review if the evidence was not readily available before the close of the record below, and is of sufficient weight to warrant an outcome different from that of the initial decision. *See, e.g., Agbenyeke v. Department of Justice*, [111 M.S.P.R. 140](#), ¶ 12 (2009). The appellant claims that he has submitted such evidence after obtaining it during discovery for his related individual right of action (IRA) appeal, now pending in the New York Field Office, *Conti v. Department of Homeland Security*, MSPB Docket No. NY-1221-11-0160-W-3. The petition for review includes nearly 2100 pages of exhibits that the appellant claims show that he resigned involuntarily. Petition for Review (PFR) File, Tab 1 at 6, 17, 21-23, 25-27, 31-33.

In *Armstrong v. Department of the Treasury*, our reviewing court emphasized the role of diligence in determining whether newly-submitted evidence gives good cause for waiving the filing deadline on review. *Armstrong*

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<sup>2</sup> After the appellant filed his petition for review, the Board amended significant portions of its adjudicatory regulations at 5 C.F.R. Part 1201. The amendments became effective November 13, 2012. *See* 77 Fed. Reg. 62350-62375 (daily ed. Oct. 12, 2012). Except where specifically indicated otherwise, however, the regulations cited in this decision were not affected by the revisions.

<sup>3</sup> The regulatory revisions mentioned above included changes to [5 C.F.R. § 1201.114](#), which governs procedures for filing a petition for review, seeking an extension of the filing deadline, and related matters. *See* 77 Fed. Reg. at 62368-69. Those revisions, however, did not change the substantive standard for establishing good cause for an untimely filing.

*v. Department of the Treasury*, [591 F.3d 1358](#), 1362-63 (Fed. Cir. 2010). The court cited *De Le Gal v. Department of Justice*, [79 M.S.P.R. 396](#), 399 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table), to show how a lengthy delay between discovery of the evidence and filing of the petition for review might imply a lack of diligence and cause the Board to question “whether it would be worthwhile to consider the new evidence.” *Armstrong*, 591 F.3d at 1362. In *De Le Gal*, one of the appellant’s newly submitted documents dated 6 months before he filed his appeal and pertained to an investigation prior to the adverse action. *De Le Gal*, 79 M.S.P.R. at 400. Because the appellant knew about the investigation and document before filing his appeal and did not seek to compel production, the Board found that he had not been diligent. *Id.* The other document, the Board found, may have been new but would not change the outcome of the appeal. *Id.* at 400-01. The Board thus dismissed the petition as untimely. *Id.* at 401.

Here, the appellant requested “an extension of time of indefinite duration” in which to conduct limited discovery. IAF, Tab 4 at 3; *see also id.* at 4-7. He asked to depose unspecified agency employees, “[e]specially those . . . employees who may be reluctant to voluntarily provide ‘positive’ declarations on behalf of the Appellant’s claims.” *Id.* at 6. He did not request any group of documents or propound interrogatories. The administrative judge denied his “request to engage in discovery for an indeterminate amount of time before responding to the jurisdictional issue,” explaining that he was the “best source with regard to the reasons” for his resignation. IAF, Tab 6 at 1. The appellant did not object to the administrative judge’s discovery order.

The administrative judge issued the initial decision on March 16, 2009. ID at 1. The finality date was April 20, 2009. ID at 7. The Board has no record of any request for an enlargement of time in which to file the petition. Instead, the appellant filed an IRA appeal on or about June 3, 2009. *See Conti v. Department of Homeland Security*, MSPB Docket No. NY-1221-09-0258-W-1, Initial

Decision at 1 (Dec. 4, 2009). The administrative judge dismissed that appeal because the appellant failed to exhaust his administrative remedies, but he later refiled it, and the administrative judge found jurisdiction. *Conti v. Department of Homeland Security*, MSPB Docket No. NY-1221-11-0160-W-2, Order Finding Jurisdiction over IRA Appeal (Apr. 11, 2012). The appeal is now pending.

During discovery for the IRA appeal, the appellant received four groups of documents, which he appended to his petition for review:

1. The agency produced its initial disclosures on June 24, 2009. PFR File, Tab 1 at 42; *see id.*, Exhibit (Ex.) B.
2. In mid to late 2009 at the earliest, and possibly as late as July 5, 2011, the appellant received fifteen Reports of Investigation (ROIs) from the Office of Professional Responsibility's (OPR's) investigation of possible conflicts between his outside employment and his agency position. *Id.*, Tab 1 at 9-10, 42. These documents were dated from February 8, 2008, through May 6, 2009, and pertain to the period between December 2007 and October 2008. *See id.*, Ex. C at 7, 96-238.
3. In September 2009, the appellant deposed nine agency employees. He submitted excerpts from seven depositions. *Id.*, Tab 1 at 10, 42. The depositions pertain to the period of the appellant's employment. *See id.*, Ex. D.
4. The agency produced most of the documents between July 5, 2011, and December 2, 2011. *Id.*, Tab 1 at 10, 42-43. These documents include correspondence and investigative reports pertaining to several alleged actions against the appellant taken during his agency employment. *Id.*, Exs. C, H. Most documents in this group pertain to the period between December 2007 and July 2009, or earlier. *See id.*, Ex. C at 8; *id.*, Ex. H at 1, 301, 423, 575.

Additionally, the appellant submitted a group of documents from the record below, *see id.*, Ex. A; two initial decisions from the IRA appeal, *see id.*, Exs. E, G; an October 26, 2010 declaration and exhibits in support of the IRA appeal, *see id.*, Ex. F; December 2011 email correspondence regarding additional discovery in the IRA appeal, *see id.*, Ex. I; court documents related to the October 2011 conviction of his immediate supervisor Steven Kucan for theft of agency property, *see id.*, Ex. J; and a December 14, 2011 declaration in support of his petition for review and motion to waive the time limit, *see id.*, Ex. K.

The bulk of the newly-submitted documents predate the appellant's resignation. Most of the remaining documents date from his October 2008 resignation through September 2009. Whether the documents were prepared before his resignation or in the months thereafter, the appellant knew of the agency's investigation and actions because he claimed that they caused him to resign. *See* IAF, Tab 7 at 4-11. Yet, he failed to file specific discovery requests regarding these matters. He failed to challenge the administrative judge's discovery ruling. He did not file a petition for review by April 20, 2009, or request an extension of time in which to file, although he clearly believed he had reason to file the June 3, 2009 whistleblowing appeal, which, *inter alia*, alleged involuntary resignation. *See Conti*, MSPB Docket No. NY-1221-09-0258-W-1, Initial Decision at 1; *Conti v. Department of Homeland Security*, MSPB Docket No. NY-1221-09-0258-W-2, Initial Decision at 3-7 (May 27, 2010). He did not file a petition for review in late 2009 after he deposed several agency employees, and he likewise did not file after receiving the initial group of documents on July 5, 2011. *See* PFR File, Tab 1, Ex. C at 1; *id.*, Ex. D. Instead, he waited until he received the final group of documents more than 5 months later. *See id.*, Ex. H at 575. That the appellant filed this petition for review soon after receiving the final group is less relevant than his failure to specifically request documents or testimony based on events of which he was aware during the initial phase of this appeal and to object to the administrative judge's discovery ruling. His actions

do not suggest that he exercised due diligence or ordinary prudence. *See Alonzo*, 4 M.S.P.R. at 184.

As for the more recent documents, items from the record below are not new. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). The appellant's primary declaration from the IRA appeal, *see* PFR File, Tab 1, Ex. E at 1-15, which addresses issues pertaining to his agency employment, also cannot be considered new. *See Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989).

The appellant argues that the documents pertaining to Kucan, *see* PFR File, Tab 1, Ex. J, show that Kucan's actions "were accomplished to get [the appellant] out of his way" and that Kucan "had [the appellant] removed because [he] was uniquely situated to discover his illegal activities," *id.*, Ex. K at 3; *see also id.*, Tab 1 at 6, 30. These documents would not warrant a different outcome. Although Kucan likely sought to avoid detection, some of the restrictions he imposed were directed towards his entire team, and not just the appellant. ID at 4-5; *see* IAF, Tab 7, Exs. C-D. Other actions against the appellant pertained to OPR's investigation of his outside work. *See* IAF, Tab 7, Ex. G. The investigation substantiated the agency's concerns, *see* PFR File, Tab 1, Ex. C at 96-168, and, indeed, the appellant's outside activities and associations had raised concerns for several years, *see id.* at 362-541.

Even the appellant's actions in obtaining the information about Kucan do not suggest he exercised due diligence. Although information about Kucan's arrest and conviction first appeared in May 2011, *see, e.g.*, Peter Sampson, *Wood-Ridge immigration agent accused of stealing \$80,000 in equipment*, NorthJersey.com, May 17, 2011, [http://www.northjersey.com/news/crime\\_courts/051711\\_Wood\\_Ridge\\_immigration\\_agent\\_arrested\\_by\\_feds.html](http://www.northjersey.com/news/crime_courts/051711_Wood_Ridge_immigration_agent_arrested_by_feds.html), the appellant did not submit it to the Board until December 14, 2011. Given its alleged significance, he was hardly diligent in delaying submission.

The appellant argues that the Board should waive the timeliness requirement because the agency failed to respond to the Acknowledgment Order. PFR File, Tab 1 at 24-29; PFR File, Tab 3 at 4. The Acknowledgment Order required the agency to present as part of its initial disclosures without awaiting a discovery request “[a] copy of, or a description by category or location of all documents in the possession, custody, or control of the agency that the agency may use in support of its claims or defenses.” IAF, Tab 2 at 5 (citing 73 Fed. Reg. 18,149 (Apr. 3, 2008)); *see also* [5 C.F.R. § 1201.73\(a\)\(1\)](#).<sup>4</sup> The appellant argues that the agency had to produce *all* of the documents later discovered in the IRA appeal at the outset of the instant appeal, including items related to the agency’s internal investigation of Kucan. PFR File, Tab 1 at 25; PFR File, Tab 3 at 4.

The appellant cited no authority to support his interpretation of the agency’s obligations during initial disclosure. Agencies can be expected to produce their documentation for removal actions taken under chapter 75 during initial disclosure because they bear the burden of proof. *See* [5 C.F.R. § 1201.56\(a\)\(1\)](#). Where an appellant alleges a constructive removal, however, he bears the burden of proof on jurisdiction. *See Markon v. Department of State*, [71 M.S.P.R. 574](#), 578 (1996); [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#). An agency may not know why an appellant resigned, especially if no adverse action had been proposed, and, at any rate, it is not obligated to help him meet his burden. The appellant’s cited cases, *Deas v. Department of Transportation*, [108 M.S.P.R. 637](#) (2008), and *Miller v. U.S. Postal Service*, [85 M.S.P.R. 494](#) (2000), address the conduct of parties *after* discovery has commenced. *See* PFR File, Tab 1 at 23-24. As for the Kucan documents, the agency appears to have initiated its

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<sup>4</sup> The recent revisions to the Board’s regulations eliminated the mandatory disclosure requirements in [5 C.F.R. § 1201.73\(a\)](#), *see* 62 Fed. Reg. 62356, 62367, but that does not foreclose the appellant’s argument that the agency violated the discovery rules in effect when this appeal was litigated at the regional level.

investigation in early 2010, about a year after the finality date. *See id.*, Ex. J at 4, 6.

Citing the Board's disapproval of a party's "gamesmanship" during litigation, *see Williams v. Equal Employment Opportunity Commission*, [75 M.S.P.R. 144](#), 148-49 (1997), the appellant accuses the agency of bad faith in delaying release of OPR's final ROI until after the finality date, PFR File, Tab 1 at 26, 28-29. As with the cases above, however, *Williams* pertains to discovery itself, and we further find no evidence that the agency was seeking to withhold potentially relevant evidence. *Cf. Hamilton v. Merit Systems Protection Board*, [75 F.3d 639](#), 646 (Fed. Cir. 1996) (agency argued that the appeal was untimely, while withholding evidence that would have established timeliness); *Gordon-Cureton v. U.S. Postal Service*, [107 M.S.P.R. 79](#), ¶ 15 (2007) (agency refused to release the appellant's Form DD 214, which would have supported her claims).

The appellant argues that the equities support relaxing the Board's deadline because the agency withheld the evidence it had when jurisdictional responses were due. PFR File, Tab 1 at 32-34. The appellant, however, has not alleged that the agency represented that the evidence he believes should have been in the initial disclosure did not exist. *See Blaha v. Office of Personnel Management*, [108 M.S.P.R. 21](#), ¶ 9 (2007) ("Equitable estoppel is applicable where a party makes false representations to induce another party to act and the second party reasonably relies on the misrepresentation to her detriment."). Nor has he alleged that the agency misled him as to the deadline for filing his petition for review. *See Pacilli v. Department of Veterans Affairs*, [113 M.S.P.R. 526](#), ¶ 11 (equitable tolling may apply "where a complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"), *aff'd*, 404 F. App'x 466 (Fed. Cir. 2010).

The appellant has not shown good cause for the delay in filing the petition for review. We therefore DISMISS the petition for review as untimely filed

without good cause shown for the delay in filing. 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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.