

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

DAVID F. GOMEZ,  
Appellant,

DOCKET NUMBER  
DA-0752-11-0667-I-1

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DATE: January 22, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Raul B. Castorena, Del Rio, Texas, for the appellant.

Major Kristina D. Penta, Randolph Air Force Base, Texas, 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 sustained the agency's removal action. For the reasons set forth below, we DISMISS the petition for review as untimely filed without a showing of good cause for the delay. The regulation that establishes the timeliness standard is

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

found in Title 5 of the Code of Federal Regulations, section 1201.114(e) ([5 C.F.R. § 1201.114\(e\)](#)).<sup>2</sup>

### **BACKGROUND**

The agency removed the appellant from the position of Aircraft Attendant based on the charge of failing to follow proper orders when such refusal may result in damage to aircraft. Initial Appeal File (IAF), Tab 9, Subtabs 4c, 4h. In selecting the removal penalty, the agency relied on the appellant's prior disciplinary record, a 3-day suspension and a 10-day suspension. *Id.*, Subtab 4h; IAF, Tab 1. The appellant appealed the action, alleging that the agency retaliated on the basis of his whistleblowing. IAF, Tab 1.

Based on the record developed by the parties, including the testimony at the hearing, the administrative judge sustained the agency's action. IAF, Tab 22. She found that the agency proved its charge through the credible testimony of a number of witnesses that the appellant refused to follow an order to secure an aircraft and that, contrary to the appellant's assertion, no lightning was within 5 nautical miles of the facility, a circumstance that would have made securing the aircraft dangerous. *Id.* at 2-8. She also found that the appellant failed to prove his affirmative defense of whistleblowing, *id.* at 10-13, and that the penalty was within the bounds of reasonableness, *id.* at 8-11. She informed the appellant that a petition for review must be filed by April 6, 2012. *Id.* at 13.

The appellant filed an apparently untimely petition for review on April 10, 2012. Petition for Review (PFR) File, Tab 1. The agency has responded. PFR File, Tab 3.

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<sup>2</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

## ANALYSIS

A petition for review must be filed within 35 days after the date of issuance of the initial decision, or, if the appellant 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](#)(e). Here, the initial decision was issued on March 2, 2012, and, as noted above, informed the appellant that, to be timely, a petition for review had to be filed on or before April 6, 2012. IAF, Tab 22 at 13. As also noted, the appellant filed his petition for review on April 10, 2012. See PFR File, Tab 1. Further, the appellant acknowledges that he received the initial decision on March 6, 2012. *Id.* Thus, as the appellant does not allege that he received the initial decision more than 5 days after it was issued, the petition for review was filed 4 days late.

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). 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).

With his petition for review, the appellant, through his union representative, submits a motion to accept his late-filed petition. See PFR File, Tab 1. He asserts that his petition is untimely because the appellant's

representative was having trouble with his computer and, after the filing deadline had passed, was involved in training stewards in a new collective bargaining agreement, which further delayed the filing. To the extent the appellant may be asserting that he relied upon a representative to timely file his petition for review, the appellant is responsible for the errors of his chosen representative, including a representative who is not an attorney. *See Lambright v. Office of Personnel Management*, [114 M.S.P.R. 507](#), ¶ 7 (2010); *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981).

Although the length of the delay in this case was relatively brief, the appellant has not shown due diligence, circumstances beyond his control that affected his ability to comply with the time limits, or unavoidable casualty or misfortune that showed a causal relationship to his inability to timely file a petition for review. None of the arguments and assertions made by the appellant in his motion to accept his late-filed petition suggests the existence of circumstances beyond his control that affected his ability to timely file his petition. *See Wyeroski*, [106 M.S.P.R. 7](#), ¶ 7.

Moreover, the appellant has not indicated what steps, if any, he took to ensure that his petition for review was timely filed. An appellant has a personal responsibility to monitor the progress of his appeal at all times and not to leave the matter entirely in the hands of his representative. *White v. Department of Justice*, [103 M.S.P.R. 312](#), ¶ 12 (2006), *aff'd*, 230 F. App'x 976 (Fed. Cir. 2007). Thus, absent a specific showing that he actively monitored the progress of his appeal but his representative thwarted his diligent efforts to pursue the appeal, the appellant cannot blame his representative's alleged negligence in seeking to excuse a filing delay. *See id.*

Although the appellant's representative contends that the filing delay is due to computer problems that led him to the mistaken belief that the petition had been filed, his assertion does not demonstrate that he acted with due diligence or ordinary prudence under the circumstances. *See, e.g., Gunn v. U.S. Postal*

*Service*, [63 M.S.P.R. 513](#), 516 n.1 (1994) (the appellant's attorney's complete reliance on an admittedly new and potentially unfamiliar computer program designed to calculate the deadline for filing a response to a petition for review did not constitute due diligence or ordinary prudence under the circumstances).

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 regarding the disposition of the merits of the 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.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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 want to request review of the Board's decision concerning your claims of prohibited personnel practices under [5 U.S.C. § 2302\(b\)\(8\)](#), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal

Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information about the United States Court of Appeals for the Federal Circuit 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. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through [http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.