

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

93 M.S.P.R. 463

KENNETH ANDERSON,
Appellant,

DOCKET NUMBER
DC-0351-95-0536-I-2

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: June 23, 2003

Kenneth Anderson, APO, AE, pro se.

Office of the Staff Judge Advocate, APO, AE, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A.G. McPhie, Member

OPINION AND ORDER

¶1 The appellant has filed an April 4, 2002 petition for review of a February 8, 1996 initial decision that affirmed the agency's reduction in force (RIF) 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.

BACKGROUND

¶2 On November 1, 1995, the appellant refiled an appeal in this case challenging his placement in a lower grade position in order to avoid separation by RIF. Refiled Appeal File, Tabs 1, 8. The agency's RIF action was affirmed in an initial decision issued on February 8, 1996. Initial Decision (ID) at 1, 6. The

initial decision informed the appellant that it would become the final decision of the Board on March 14, 1996, unless he filed a petition for review by that date. ID at 6.

¶3 The appellant filed a petition for review regarding this case on April 4, 2002, and submitted a motion made under penalty of perjury to accept the petition as timely filed or to set aside the filing deadline. Petition For Review File (PFRF), Tab 1. The agency did not file a response.

ANALYSIS

¶4 A petition for review must be filed within 35 days after the initial decision was issued. 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, 1201.114(f). To establish good cause, 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 will consider the length of the delay, the reasonableness of the appellant's excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune that prevented him from timely filing 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 appellant has the burden of proof on the issue of timeliness. 5 C.F.R. §§ 1201.56(a)(2)(ii), 1201.114(f).

¶5 The initial decision was issued on February 8, 1996, and the appellant filed his petition for review on April 4, 2002, more than six years late. The appellant alleges in his motion to set aside the filing deadline that the documents he has attached to his petition demonstrate the circumstances that caused him to file his petition late. PFRF, Tab 1. Based on the statements he makes in his petition for review, and the documents attached to the petition, it appears that the appellant is

alleging that the Office of Personnel Management (OPM), in a June 1, 2000 final decision, erroneously upheld his employing agency's denial of his request for retroactive payment of a living quarters allowance (LQA) for his overseas civilian service from December 3, 1987, to October 28, 1992.* The appellant presents no arguments challenging the Board's February 8, 1996 initial decision.

¶6 The appellant's apparent argument and evidence regarding the merits of OPM's June 1, 2000 final decision on his LQA request is not relevant to the issue of the timeliness of his petition for review in this case. *See, e.g., Coles v. Department of the Army*, 85 M.S.P.R. 571, ¶ 5 (2000); *Marasco v. U.S. Postal Service*, 66 M.S.P.R. 555, 558 (1995). Further, the fact that the appellant may have been pursuing other appeals or waiting for decisions by other agencies does not constitute good cause for waiving the regulatory time limit for filing his petition for review. *See, e.g., Zamot v. U.S. Postal Service*, 91 M.S.P.R. 475, ¶ 6 (2002) (the appellant's decision to wait for a decision by the Equal Employment Opportunity Commission before filing his petition for review does not constitute good cause), *review dismissed*, No. 02-3321 (Fed. Cir. Oct. 16, 2002); *Shimmin v. Department of Justice*, 63 M.S.P.R. 435, 438 ("the appellant's decision to pursue his appeal rights through other forums, rather than filing a petition for review with the Board, does not establish good cause for the untimely filing of his petition"), *aff'd*, 43 F.3d 1486 (Fed. Cir. 1994) (Table).

* The appellant states in his petition for review that his "appeal is based on OPM's denial of my LQA from December 1987 to October, [sic] 1992." PFRF, Tab 1 at 3. To the extent that the appellant is actually attempting to appeal OPM's June 1, 2000 final decision upholding his employing agency's denial of his request for a LQA, we note that the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation, and the Board has previously found that it does not have jurisdiction to review an agency's denial of a request for a LQA. *See Fernandez v. Department of the Army*, 84 M.S.P.R. 550, ¶ 3 (1999), *aff'd*, 234 F.3d 553 (Fed. Cir. 2000).

¶7 Accordingly, the appellant has failed to show good cause for his lengthy delay in filing his petition for review and we find no basis upon which to grant a waiver of the filing deadline. Therefore, we DISMISS the petition for review as untimely filed.

ORDER

¶8 This is the final order 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 merits of the appeal. 5 C.F.R. § 1201.113.

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 web site, <http://www.mspb.gov>.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.