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

**2006 MSPB 10**

Docket No. AT-0752-05-0511-I-1

**Robert Belcher,**

**Appellant,**

**v.**

**United States Postal Service,**

**Agency.**

February 3, 2006

Robert Belcher, College Park, Georgia, pro se.

Toni M. Sellers, Esquire, Atlanta, Georgia, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

## OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an August 11, 2005 initial decision (ID) that affirmed the agency's removal action. For the following reasons, we DISMISS the appellant's PFR as untimely filed with no showing of good cause for the delay. 5 C.F.R. § 1201.114(d).

## BACKGROUND

¶2 The appellant was removed from the position of City Carrier based on a charge of improper conduct. Initial Appeal File (IAF), Tab 5, Subtabs 4C, 4D. The charge was based on a First Offender Sentence that the appellant received in

Clayton County Superior Court, sentencing him to two and one-half years of probation for one count of criminal attempt of enticing a child for indecent purposes and five years of probation for one count of child molestation, to be served concurrently. *Id.*, Subtab 4D. One of the conditions of the appellant's probation prohibited him from going to or loitering near places primarily used by children under the age of 18. *Id.* The agency found that the charge was supported and removed him effective October 15, 2004. IAF, Tab 5, Subtab 4C.

¶3 The appellant, represented by counsel, appealed to the Board and requested a hearing, challenging the merits of the removal action and arguing that he was discriminated against based on his sex and race. IAF, Tabs 1, 15. After holding the requested hearing, the administrative judge (AJ) affirmed the removal action. IAF, Tab 16, ID at 1-11. The AJ found that the agency proved its charge, the appellant did not prove that he was subjected to disparate treatment based on sex and race, the action promoted the efficiency of the service, and the penalty was reasonable. *Id.* The ID informed the appellant that it would become final on September 15, 2005, unless a PFR was filed by that date. ID at 11.

¶4 The appellant, now pro se, has filed a PFR on September 21, 2005, and submitted several documents with the PFR, some of which were not submitted below. Petition for Review File (PFRF), Tab 1. The Clerk of the Board notified the appellant that his PFR was untimely filed and ordered him to file a motion for waiver of the time limit, including an affidavit or sworn statement showing good cause for the delay. *Id.*, Tab 2. In addition, the Clerk provided the appellant with a copy of the Board's "Motion to Accept Filing as Timely or to Waive Time Limit." *Id.* In response, the appellant submitted a sworn statement arguing that good cause exists for his untimely PFR because he is no longer represented by his attorney and he mistakenly believed that his attorney had submitted the alleged new documents to the Board. PFRF, Tab 3. The agency has responded in opposition. PFRF, Tab 4.

## ANALYSIS

The appellant's PFR was untimely filed with no showing of good cause for the delay.

¶5 To be timely, a PFR must be filed within 35 days after the ID was issued, or, if the appellant shows that he received the ID more than five days after it was issued, within 30 days after the date the appellant received the ID. 5 C.F.R. § 1201.114(d). The appellant has not alleged or established that he received the ID more than five days after it was issued. PFRF, Tabs 1, 3. Thus, the appellant's September 21, 2005 PFR, due on September 15, 2005, was six days late.

¶6 The Board will waive the time limit for filing a PFR only upon a showing of good cause for the delay. 5 C.F.R. § 1201.12, 1201.114(f). To establish good cause, an appellant 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 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. *See 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).

¶7 Here, the appellant claims that he believed that his representative below would file the PFR with the alleged new evidence. PFRF, Tab 3. The appellant is now pro se and the filing delay of six days was not particularly lengthy, but he has not shown that he exercised due diligence. Regardless of whether the appellant believed that his attorney would file the PFR on his behalf, the appellant remained personally responsible for the prosecution of his PFR. *See Murphy v. Department of the Treasury*, 91 M.S.P.R. 239, ¶ 7 (2002), *aff'd*, 85

F. App'x 729 (Fed. Cir. 2003); *Depierro v. U.S. Postal Service*, 54 M.S.P.R. 251, 254 (1992). The appellant is responsible for the errors of his chosen representative except where he has proven that his diligent efforts to prosecute an appeal were thwarted, without his knowledge, by his attorney's deceptions and negligence. *See Murphy*, 91 M.S.P.R. 239, ¶ 7; *Dunbar v. Department of the Navy*, 43 M.S.P.R. 640, 643-45 (1990). Although the appellant submitted his own sworn statement, he did not submit any corroborating evidence or show that he tried to contact his attorney before the filing deadline or otherwise made any effort to ensure that his PFR would be timely filed. Under these circumstances, we find that the appellant did not make diligent and repeated efforts to monitor the progress of his appeal, and that he has not established sufficient grounds to overcome the well-established rule that an appellant is responsible for the mistakes of his chosen representative. *See Strong v. Department of the Navy*, 86 M.S.P.R. 243, ¶ 11 (2000); *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981).

The Board will not reopen the appeal based on the appellant's submission of alleged new evidence.

¶8 In support of his PFR, the appellant has submitted affidavits that are part of the March 8, 2005 report from the agency's equal employment opportunity (EEO) investigation into the appellant's complaint of discrimination regarding the removal action and information from the Georgia sex offender registry regarding an individual who allegedly works as a Distribution Clerk for the agency. PFRF, Tab 1 at 18-30. The other documents submitted by the appellant were included in the record below. PFRF, Tab 1 at 5-17; IAF, Tab 12. The appellant asserts that the affidavits contradict the testimony given by some of the agency's witnesses at the hearing and that the evidence regarding the other alleged employee supports the appellant's claim that he was subjected to disparate treatment. PFRF, Tab 1 at 1.

¶9 The Board does not allow the submission of new evidence to cure the untimely filing of a PFR. *Murphy*, 91 M.S.P.R. 239, ¶ 11. The Board, however, will reopen based on new evidence when that evidence is also material. *Id.* In order to show that the evidence submitted is new and material, the appellant must demonstrate that: (1) the documents and the information contained in the documents were unavailable before the record closed despite due diligence; and (2) the evidence is of sufficient weight to warrant an outcome different from that of the ID. 5 C.F.R. § 1201.115(d)(1); *Murphy*, 91 M.S.P.R. 239, ¶ 11.

¶10 The affidavits submitted clearly are not new because the agency's EEO investigative report was issued on March 8, 2005, the appellant did not file his petition for appeal until April 12, 2005, and the initial decision was issued on August 11, 2005. IAF, Tabs 1, 15, 16; PFRF, Tab 1 at 18-28. In addition, evidence submitted on PFR to impeach a witness's credibility is generally not considered new and material. *See Murphy*, 91 M.S.P.R. 239, ¶ 12; *Brown v. Department of the Navy*, 71 M.S.P.R. 479, 482 (1996). Thus, the information was not unavailable despite the appellant's due diligence when the record closed. *See Murphy*, 91 M.S.P.R. 239, ¶ 12.

¶11 The information from the Georgia sex offender registry is also not new. PFRF, Tab 1. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. *See Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989). The individual cited by the appellant was convicted on March 24, 2005, and the appellant has not shown why this information was unavailable despite due diligence before the close of the record below. Further, this evidence cannot be used to support the appellant's claim of disparate treatment on the basis of race and sex because the individual and the appellant are both black males. PFRF, Tab 1 at 30; IAF, Tab 15 at 2-3. Thus, the appellant has not shown that the information is of sufficient weight to

warrant an outcome different from that of the ID. *See Murphy*, 91 M.S.P.R. 239, ¶ 12.

¶12 The Board also will reopen on its own motion to address clear legal error in the ID. *Murphy*, 91 M.S.P.R. 239, ¶ 13; *see* 5 U.S.C. § 7701(e)(1)(B); 5 C.F.R. § 1201.118. As discussed above, the evidence submitted by the appellant on PFR is not new and material evidence. Thus, the AJ properly relied on the agency's witnesses' testimony and also found that the appellant did not show that he was subjected to disparate treatment on the basis of race or sex. The evidence submitted does not establish clear legal error in the ID, and does not warrant reopening this appeal. *See Murphy*, 91 M.S.P.R. 239, ¶ 13.

¶13 Accordingly, we dismiss the appellant's PFR as untimely filed with no good cause for the delay in filing. *See Alonzo*, 4 M.S.P.R. at 184.

## ORDER

¶14 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 website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. 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:

_____
Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.