

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

WILLIAM BROWN, JR.,  
Appellant,

v.

U.S. POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
NY07529110273

DATE: JAN 6 1992

William Brown, Jr., Staten Island, New York, pro se.

Barbara Ashe, New York, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision that dismissed his appeal as untimely filed. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal as untimely filed.

### BACKGROUND

On April 2, 1991, the appellant petitioned for appeal and requested a hearing of his removal from the position of Custodian, allegedly effective January 31, 1991. Appeal File, Tab 1. The removal action was based on the appellant's alleged absence without leave from March 5, 1990, through March 16, 1990, and from March 21, 1990, through April 17, 1990, and his failure to comply with agency regulations governing absences. *Id.*, Tab 4, Subtabs 9 and 11.

In his acknowledgment order, the administrative judge noted that the appeal appeared to be untimely filed and ordered the appellant to present evidence and argument showing that the appeal was timely filed or that good cause existed for the delay. Appeal File, Tab 2. The appellant's timely response to the order addressed the merits of his appeal and reiterated his request for a hearing, but failed to address the apparent untimeliness of his appeal. *Id.*, Tab 3. The agency responded to the acknowledgment order, and asserted that the appellant was removed effective June 5, 1990, and that the appeal was untimely filed. *Id.*, Tab 4. The administrative judge thereafter issued an initial decision that found that the appellant was removed effective June 5, 1990, and that the appeal was untimely filed. He dismissed the appeal due to the appellant's failure to show good cause for its untimeliness.

In his timely refiled petition for review, the appellant asserts that he did not file his petition for appeal earlier

because a receptionist at the Board informed him that he could not file an appeal until the agency sent him a letter of removal, and that he had not received such a letter from the agency. Petition For Review File, Tab 3. He claims that the only letter he received from the agency was the removal proposal notice. He further contends that he has still received "nothing [from the agency] to say I am removed," (emphasis in original) and that he still has his agency identification card. The agency has not responded to the petition for review.

#### ANALYSIS

The record reflects that on May 25, 1990, the agency sent the appellant a May 15, 1990 removal decision notice by ordinary and certified mail. Appeal File, Tab 4, Subtabs 11, 11A, 11B. The appellant signed the certified mail return receipt and the receipt was returned to the agency by May 30, 1990. *Id.*, Tab 4, Subtab 11B. Thus, the record reflects that the appellant received the decision notice removing him effective June 5, 1990. The decision notice informed the appellant of his right of appeal to the Board, the time limit for filing his appeal, and of his right to grieve his removal under the terms of the applicable collective bargaining agreement.<sup>1</sup> *Id.*, Tab 4, Subtab 11.

<sup>1</sup> The appellant, a preference eligible, see Appeal File, Tab 4, Subtab 19, had the right to appeal the removal action to the Board as well as the right to invoke the grievance procedure provided by the collective bargaining agreement. See *Hall v. U.S. Postal Service*, 26 M.S.P.R. 233, 235-37 (1985).

The record contains a number of documents relating to a grievance filed by the appellant's union regarding his June 5, 1990 removal. These documents indicate that the parties reached a settlement of the grievance. Under the terms of the settlement, set forth in a November 8, 1990 letter signed by an agency labor relations manager and a union official, the agency agreed that the appellant had provided acceptable evidence for his absences and agreed to reinstate him on a last chance basis in a probationary status for one year, with no back pay, if he passed a fitness for duty examination and participated and successfully completed the agency's Employee Assistance Program. Appeal File, Tab 4, Subtab 16. The record reflects that the appellant submitted to a fitness for duty examination on November 8, 1990, see *id.*, Tab 4, Subtabs 17, 17A, but the record does not indicate whether the appellant passed the examination or returned to work thereafter. By letter dated January 7, 1991, the appellant's union withdrew the grievance "per [the] settlement decision." *Id.*, Tab 4, Subtab 18.

On January 31, 1991, however, the agency issued a PS-50, notification of personnel action, which indicates that the appellant was removed effective January 7, 1991. Appeal File, Tab 4, Subtab 19. The reasons for the personnel action stated on that form were the appellant's leave offenses that gave rise to the May 15, 1990 removal decision notice. The remarks

section of the form is incomplete,<sup>2</sup> and there is no further explanation in the record for this personnel action.

In his April 2, 1991 petition for appeal, the appellant stated that he was not removed until January 31, 1991, and that he never received a final decision from the agency. Appeal File, Tab 1, Petition For Appeal, Boxes 21 and 29. He reasserts this argument in his petition for review. Petition For Review File, Tab 3. Thus, it is possible that the appellant is challenging a removal action that was effective on January 31, 1991, rather than June 5, 1990.

The administrative judge concluded that the appellant's appeal was untimely filed based on his finding that the removal action was effective on June 5, 1990. Assuming, without deciding, that the appellant was in fact removed effective January 31, 1991, the petition for appeal was still untimely filed.

A petition for appeal must be filed within 20 days after the effective date of the action being appealed. 5 C.F.R. § 1201.22(b). This time limit may be waived only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.22(c). To establish good cause for an untimely appeal, a party must show that he exercised diligence or ordinary prudence under the particular circumstances of the

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<sup>2</sup> The PS-50, notification of personnel action, states in the remarks section that: "[Y]ou [the appellant] took a F.F.B [fitness for duty] exam on 11-8-90 & the Dr. told you [to] come back for results & then you[...]" Appeal File, Tab 4, Subtab 19. The remainder of the remarks are missing.

case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). In the interest of judicial efficiency and fairness, the Board will not waive its timeliness requirements in the absence of good cause shown, regardless of how minimal the delay. *Green v. Office of Personnel Management*, 36 M.S.P.R. 131, 132-33 (1988).

In the instant case, the appellant filed his petition for appeal on April 2, 1991, 61 days after the alleged January 31, 1991 effective date of his removal. Appeal File, Tab 1. The administrative judge informed the appellant that his appeal appeared to be untimely filed and ordered him to show that it was timely filed or that good cause existed for the delay. *Id.*, Tab 2. The appellant, however, failed to address the timeliness issue in his response to the administrative judge's order, *id.*, Tab 3, and, thus, the administrative judge dismissed the appeal as untimely filed. *Id.*, Tab 5.

In his petition for review, the appellant asserts for the first time that he did not file his appeal earlier because he never received a letter of removal from the agency and because a Board receptionist informed him that he could not file an appeal until he received such a letter. Petition For Review File, Tab 3. The appellant has not shown why he did not present this argument to the administrative judge in response to the order to show good cause for the untimely filing of the petition for appeal. He has not shown that this argument was not available below despite his due diligence, and the Board

will not consider it now. See *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

Thus, based on the evidence in the record, we find that the appellant's petition for appeal was untimely filed and that good cause has not been shown for the delay. See *Sledge v. Department of Justice*, 44 M.S.P.R. 455, 459 (1990) (the administrative judge properly dismissed the petition for appeal where the appellant failed to respond to the administrative judge's order to justify the late filing of her petition for appeal and she failed to explain in her petition for review why she did not respond below), *aff'd*, 923 F.2d 870 (Fed. Cir. 1990) (Table); see also *Riley v. Department of the Navy*, 33 M.S.P.R. 670, 672-73 (1987).<sup>3</sup>

Accordingly, we conclude that the administrative judge correctly dismissed the appeal as untimely because the appellant failed to show good cause for waiving the time limit for filing a petition for appeal.<sup>4</sup>

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<sup>3</sup> Furthermore, the Board routinely dismisses petitions for review as untimely filed when a party fails to respond with relevant material to a show cause order regarding the timeliness of a petition for review. See *Gomid v. Office of Personnel Management*, MSPB Docket No. SE08319010538 (Aug. 21, 1991); *Junio v. Office of Personnel Management*, 40 M.S.P.R. 269, 270 (1989); *Mejia v. Office of Personnel Management*, 38 M.S.P.R. 472, 473 (1988).

<sup>4</sup> If, as the administrative judge found, the appellant's removal was effective June 5, 1990, his appeal is still untimely filed because the appellant has not shown good cause for the delay in filing between January 31, 1991, and April 2, 1991. Similarly, if the appellant was removed effective January 7, 1991, as stated in the PS-50, the appeal was untimely filed and he has not shown good cause for the delay.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

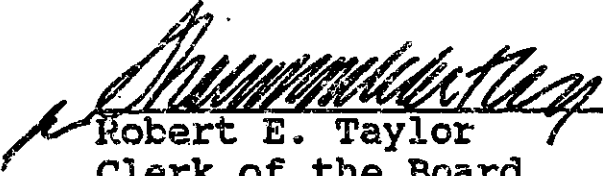
NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:



Robert E. Taylor  
Clerk of the Board

Washington, D.C.