

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

85 M.S.P.R. 674

PHILLIP D. CALDWELL

Appellant,

DOCKET NUMBER

CH-0752-00-0003-I-1

v.

DEPARTMENT OF THE TREASURY

Agency.

DATE: April 18, 2000

Phillip D. Caldwell, Detroit, Michigan, pro se.

Eileen P. Collins, Esquire, New York, New York, for the agency.

**BEFORE**

Beth S. Slavet, Acting Chairman

Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 The appellant has filed a timely petition for review of an initial decision that dismissed his petition for appeal as untimely filed. For the reasons discussed below, we find that the petition does not meet the requirements for review at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, REVERSE the initial decision, and REMAND the appeal to the regional office for adjudication on the merits. 5 C.F.R. § 1201.117.

## BACKGROUND

¶2 The agency issued a notice informing the appellant of its decision to remove him from his position as a GS-8 Contact Representative with the Internal Revenue Service in Detroit, Michigan, effective August 6, 1999. Initial Appeal (IA) File, Tab 6, subtab 4B. The notice informed the appellant that he had the right to appeal his removal to the Board, and that an appeal must be filed within 30 days after the effective date of his removal. *Id.* Thus, the deadline for filing his appeal was September 7, 1999. 5 C.F.R. §§ 1201.22(b), 1201.23.

¶3 The appellant's pro se petition for appeal was filed on September 28, 1999. IA File, Tab 1. On October 1, 1999, the administrative judge (AJ) issued an acknowledgment order directing the appellant to file evidence and argument showing that his appeal was timely filed or that good cause existed for the delay, within 15 days of the date of the order. IA File, Tab 2. Without having received any response from the parties to the acknowledgment order, the AJ on October 22, 1999, issued the initial decision dismissing the appeal as untimely filed. Initial Decision (ID). The AJ found that the record showed that the appellant received the agency's August 6, 1999 decision notice as of its issuance, but that even if the appellant did not receive the decision notice until August 23, 1999, as he indicated in his appeal form, his appeal would still have been untimely filed by 6 days and no good cause was shown for the delay. *Id.*

¶4 On October 19, 1999, the agency filed its appeal file, which was received by the regional office on October 25, 1999, after the issuance of the initial decision. IA File, Tab 6. On October 19, 1999, the appellant untimely filed his response to the acknowledgment order, which was received by the regional office on October 25, 1999. IA File, Tab 7.

¶5 In his response to the acknowledgment order, the appellant stated that the National Treasury Employees Union (NTEU), by letter dated August 30, 1999, informed the appellant that it would not invoke arbitration over his August 6, 1999 removal. IA File, Tab I at 13-14, Tab 7 at 4-5. The appellant stated that he

received the letter on September 3, 1999. *Id.*, Tab 7 at 1. The appellant also asserted that he timely sent a letter, via certified mail, to the Board's Central Regional Office on September 4, 1999, requesting a 30-day extension of time to file his appeal. IA File, Tab 7 at 1. He submitted a copy of his extension of time request dated September 3, 1999, and stamped as received by the regional office on September 8, 1999, and a copy of the envelope in which he asserted he mailed his extension request, properly addressed to the regional office and postmarked September 4, 1999. *Id.* at 6-7. In his request for an extension, the appellant stated that, due "to the shock of losing [his] Job and [his] other personal financial problems," he was unable to "properly reply" within the 30 day period following his removal. *Id.* at 6.

¶6 In his timely petition for review, the appellant asserts that the AJ failed to consider that: (1) The appellant did not receive notice of the NTEU's decision not to invoke arbitration over his removal and not to represent him until September 4, 1999; (2) the NTEU had all of the evidence underlying his removal; and (3) upon receiving notice that the union would not represent him, he immediately filed his request for an extension of time to file his appeal with the regional office by the deadline for filing an appeal. Petition for Review (PFR) File, Tab 1. The agency has timely responded to the petition, asserting in relevant part that the appellant untimely filed his petition for appeal on or after September 24, 1999, and that he failed to respond to the order to show cause that good cause existed for the delay in filing his appeal. *Id.*, Tab 3 at 4.

### ANALYSIS

¶7 In his initial decision, the AJ correctly found that the appellant's removal was effective August 6, 1999, and that he filed his appeal on September 28, 1999. *ID* at 1-2. The AJ correctly stated that an appeal from an agency's action must be filed within 30 days after the effective date of the action pursuant to 5 C.F.R. § 1201.22(b). *Id.* The AJ found that the deadline for the appeal was September 6,

1999. ID at 2. However, because September 6, 1999, was Labor Day, a federal holiday, the filing period included September 7, 1999. 5 C.F.R. § 1201.23. In the absence of a timely response from the appellant to the AJ's acknowledgment order on timeliness, the AJ correctly dismissed the appeal based on the appellant's failure to allege, let alone prove, that his appeal filed on September 28, 1999, was timely or that he had good cause for the untimely filing. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

¶8 The appellant filed his response to the acknowledgment order on timeliness 1-day late, on October 19, 1999, and it was not received by the regional office until October 25, 1999, after the issuance of the initial decision. IA File, Tab 7. The appellant asserts that he diligently pursued his appeal by filing the September 4, 1999 request for a 30-day extension of time to file his appeal with the regional office immediately upon receiving notice from NTEU of its decision not to arbitrate the grievance over his removal and its refusal to represent him. The appellant's extension of time request was filed before the September 7, 1999 deadline for filing his petition for appeal. The appellant's evidence is credible and un rebutted by the agency, and he filed his appeal on September 28, 1999, within 30 days of his extension request. Based on these facts, coupled with his pro se status and his obvious confusion, we find that the appellant has established good cause for his untimely filing. *Alonzo*, 4 M.S.P.R. at 184; *see Quarezo 1*). *Office of Personnel Management*, 11 M.S.P.R. 522, 523 (1982) (the pro se appellant showed good cause for his untimely petition for appeal where he timely filed a motion with the regional office "to have his claim freezed," the regional office notified him that the Board's regulations did not contemplate or permit such request and that the time limit for filing an appeal was running, and he filed his petition for appeal 2 days following his receipt of this response). Further, the agency has neither asserted nor shown any substantial prejudice caused to it by the delay in filing. *Alonzo*, 4 M.S.P.R. at 184.

¶9 Therefore, under all of the circumstances, we waive the time limit for filing the petition for appeal in this case. *See Shiflett v. U.S. Postal Service*, 839 F.2d 669, 670-74 (Fed. Cir. 1988).

**ORDER**

¶10 Accordingly, we REMAND this appeal to the regional office for adjudication on the merits.

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.