

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

GAIL McCULLEY,  
Appellant,  
  
v.  
  
UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
BN0752920035-B-1

DATE: JUL 09 1993

Gail McCulley, Woodbridge, Virginia, pro se.

Lucille G. Adams, Mount Vernon, 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 filed an untimely petition for review of an initial decision that dismissed her petition for appeal as moot. For the reasons set forth below, we DISMISS the petition for review as untimely filed with no showing of good cause to waive the filing deadline.

BACKGROUND

The appellant filed an appeal of the agency's action demoting her from her EAS-15 Supervisor of Mails position to a PS-5 Part-Time Flexible Clerk position. See MSPB Docket

No. BN07529110236, Initial Appeal File (IAF), Tab 4, Subtab 3E. The administrative judge dismissed the appeal as moot, finding in his initial decision that the agency had completely rescinded the demotion. See MSPB Docket No. BN0752920035-I-1, IAF, Tab 14. The Board granted the appellant's petition for review of that initial decision, however, and remanded the appeal to the regional office for a determination of whether the appellant had been returned to the status quo ante. See *id.*, Petition For Review (PFR) File, Tabs 1, 8. On remand, the administrative judge again dismissed the appeal as moot after the agency submitted evidence that it had returned the appellant to the status quo ante. See Remand IAF, Tab 21.

The appellant filed a pleading, dated March 23, 1993, with the regional office that the regional office treated as a petition for review and forwarded to the Clerk of the Board. See Remand PFR File, Tab 1. As the pleading was not served on the parties, the Clerk of the Board returned the pleading to the appellant, affording her an opportunity to correct the deficiency, while also informing her that her petition for review was untimely and advising her to file evidence and argument to show that good cause to waive the filing deadline existed. See *id.*, Tab 2. The appellant refiled her petition for review with the deficiency corrected, but did not address the issue of good cause for the delay in filing. The agency has not responded to the petition for review.

### ANALYSIS

The appellant appears to consider her March 23, 1993, pleading as a petition for enforcement in which she seeks to have the agency purge her Official Personnel Folder (OPF) of a performance appraisal that refers to her rescinded demotion. After examining the record, however, we agree with the regional office that the pleading should be handled as a petition for review of the remand initial decision dismissing the appellant's appeal, rather than as a petition for enforcement. As the regional office noted in forwarding the petition to the Clerk, the appellant is challenging the administrative judge's finding that the agency purged her OPF. See Remand PFR File, Tab 1. This finding was made in support of the conclusion that the agency had completely rescinded the appellant's demotion and that the appeal therefore should be dismissed. See Remand Initial Decision at 3; Remand IAF, Tabs 16, 17, 18, 19, 20. Moreover, the administrative judge's remand initial decision did not order the agency to take any action, and therefore a petition for enforcement would not be appropriate.

The Board's regulations provide that a petition for review must be filed within 35 days after the issuance of the initial decision. See 5 C.F.R. § 1201.114(c). The Board may waive its timeliness requirement if a party shows good cause for the late filing. To establish good cause, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. See *Alonzo v.*

Department of Defense, 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 in filing. See *Goldberg v. Department of Defense*, 39 M.S.P.R. 515, 518 (1989).

The administrative judge issued the remand initial decision on September 30, 1992, and informed the appellant that the decision would become final on November 4, 1992, unless either party filed a petition for review. The regional office received the petition for review, dated March 23, 1993, on March 26, 1993. The record does not show the exact date of filing of the petition for review but it clearly was filed after the November 4, 1992, deadline.<sup>1</sup>

As we have indicated above, although the Clerk afforded the appellant an opportunity to show good cause for the untimeliness of her petition, the appellant has not responded by addressing that issue. Furthermore, the circumstances that the appellant describes in her petition for review do not show good cause. The appellant asserts that when she sought assignment to another position in March 1993 she learned that a performance evaluation still contained a reference to her demotion. See Remand PFR File, Tab 3. The fact that the

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<sup>1</sup> Under the Board's regulations, the date of filing by personal delivery is the date on which the Board receives the document, and the date of filing by mail is the postmark date. See 5 C.F.R. § 1201.4(1). The record does not indicate whether the pleading was filed by personal delivery or mail. See PFR File, Tab 1.

appellant only learned of this reference in March 1993 does not excuse the late filing. Her failure to review the OPF when given an opportunity to do so while her appeal was pending below does not evidence the diligence required to justify waiving the filing deadline.<sup>2</sup> See *Rutledge v. United States Postal Service*, 54 M.S.P.R. 283, 284-85 (1992).

Because the appellant has not shown good cause for her late filing, we decline to waive the filing deadline. See *Montgomery v. United States Postal Service*, 53 M.S.P.R. 578, 580, *aff'd*, 980 F.2d 743 (Fed. Cir. 1992) (Table), *cert. denied*, 113 S. Ct. 1299 (1993).

#### ORDER

This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision will remain the final decision of the Board with regard to the merits of the appeal. See 5 C.F.R. § 1201.113.

#### 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:

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<sup>2</sup> While the appeal was pending before the regional office on remand, the administrative judge afforded the appellant an opportunity to examine her OPF and object to dismissal of the appeal. He further advised her that failure to object would be considered consent to divestiture of the Board's jurisdiction. See Remand IAF, Tab 19.

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.