

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

85 M.S.P.R. 478

EARL MOSS,

Appellant,

DOCKET NUMBER

DC-1221-99-0828-W-1

v.

DEPARTMENT OF THE ARMY,

Agency.

DATE: March 20, 2000

Earl Moss, Mannheim, Germany, pro se.

Tracy A. Allred, Esquire, Mannheim, Germany, for the agency.

**BEFORE**

Beth S. Slavet, Acting Chairman  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 The appellant petitions for review of an initial decision that dismissed his individual right of action (IRA) appeal as untimely filed. For the reasons set forth below, we GRANT his petition under 5 C.F.R. § 1201.115, REVERSE the initial decision, and REMAND the appeal for further adjudication.

**BACKGROUND**

¶2 By a notice dated July 21, 1999, the Office of Special Counsel (OSC) informed the appellant that it had terminated its investigation of his allegations without taking corrective action and that he may seek corrective action before the Board by filing an IRA appeal within 65 days from the date of the notice. Initial

Appeal File (IAF), Tab 1. By a submission postmarked September 25, 1999, the appellant filed this IRA appeal. *Id.* The administrative judge (AJ) informed the appellant that it appeared his appeal was untimely filed, and afforded him an opportunity to submit evidence and argument addressing the timeliness issue. IAF, Tab 3. After considering the parties' responsive submissions, IAF, Tabs 5, 7, the AJ dismissed the appeal as untimely filed, finding that the appeal was filed one day beyond the filing deadline of September 24, 1999, and that there was no basis for waiver of the time limit. IAF, Tab 8.

¶3 The appellant has timely filed a petition for review reasserting, inter alia, his contention below that he did not receive OSC's July 21, 1999 notice until July 27, 1999. Petition for Review File (PRF), Tab 1. The agency has timely responded in opposition to the appellant's petition. PRF, Tab 3.

### ANALYSIS

¶4 Under 5 U.S.C. § 1214(a)(3), an IRA appeal must be filed "no more than 60 days" after "notification was provided" to the appellant by OSC that it had terminated its investigation. The Board's implementing regulations provide, in pertinent part, that an IRA appeal must be filed:

(1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification ....

5 C.F.R. § 1209.5(a)(1) (emphasis added).

¶5 In response to the AJ's order to address the timeliness issue, the appellant contended below that he received OSC's July 21 termination notice on July 27, and that upon receiving the notice, he "immediately faxed" to OSC a memorandum, a copy of which was included in his appeal package. IAF, Tab 5 at 1, 2, 4. Indeed, the appellant's petition for appeal included a copy of his "Fax/Memo" to OSC dated July 27, 1999, in which he stated that he had "just

received [OSC's] letter, dated 21 July 99, formally advising [him] on the termination of the inquiry ...." IAF, Tab 1.

¶6 Unless specifically required by the AJ, an appellant's statement on the timeliness of a petition for appeal need not be sworn or in affidavit form. *See Pagel v. U.S. Postal Service*, 84 M.S.P.R. 540, ¶ 6 (1999); *Blue v. U.S. Postal Service*, 65 M.S.P.R. 370, 375 (1994), *aff'd*, 65 F.3d 188 (Fed. Cir. 1995) (Table). Here, the AJ did not require that the appellant's statement on timeliness be sworn or in affidavit form. IAF, Tab 3. Therefore, the appellant's unsworn statement below that he received OSC's termination notice on July 27 should be given significant evidentiary weight, particularly since it was corroborated by his July 27, 1999 memorandum to OSC. *See Pagel*, 84 M.S.P.R. 540, ¶¶ 6-7. Moreover, the agency has not disputed the appellant's statement, and has not submitted any evidence to contradict it. *See id.*, ¶ 7. In light of these factors, as well as the appellant's pro se status throughout this appeal, we find that the appellant established that he received OSC's termination notice on July 27, 1999, and thereby established that his appeal was timely filed on September 25, 1999, within 60 days after his receipt of the notice. *See id.*, ¶ 8. Accordingly, we reverse the AJ's dismissal of this appeal as untimely filed, and remand the appeal for further adjudication.

### ORDER

¶7 On remand, the AJ shall determine whether the Board has jurisdiction over this IRA appeal, and if so, he shall adjudicate the merits of the appeal.

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.