

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

71 M.S.P.R. 332

Docket Number DE-0752-89-0371-C-3

EDWARD C. PATTERSON, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: AUG 21, 1996

Edward C. Patterson, Denver, Colorado, pro se.

Dan L. Foster, Denver, Colorado, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has filed a "motion to reopen" his case, which we are considering a timely petition for review of the February 1, 1996 compliance initial decision that dismissed his petition for enforcement as untimely filed. For the reasons discussed below, we GRANT the petition under 5 C.F.R. § 1201.115, VACATE the compliance initial decision, but still DISMISS the appellant's petition for enforcement as untimely filed.

BACKGROUND

The agency removed the appellant from his Mail Handler position in January 1988. Initial Appeal File (IAF), Tab 5, subtabs 3-5. In November 1989, the parties settled the appellant's appeal of his removal. IAF, Tab 12. Accordingly, in an initial decision that became the final decision of the Board, the administrative judge dismissed the appeal, retaining jurisdiction to enforce the settlement agreement. *Patterson v. U.S. Postal Service*, MSPB Docket No. DE-0752-89-0371-I-1 (Initial Decision, Nov. 28, 1989).

The appellant subsequently filed two petitions for enforcement of the settlement agreement. The Board ultimately dismissed both petitions. *Patterson v. U.S. Postal Service*, 47 M.S.P.R. 659 (1991) (Table); *Patterson v. U.S. Postal Service*, 53 M.S.P.R. 603 (1992) (Table).

On December 18, 1995, the appellant filed this petition for enforcement. Compliance File (CF) 3, Tab 1. After allowing the appellant to show good cause for the apparent untimeliness of his petition, the administrative judge dismissed the petition. He found that the appellant filed his petition nearly 6 years after he settled his appeal, and that the appellant had failed to show good cause for his untimeliness. Compliance Initial Decision (C.I.D.) at 2-3.

The appellant has filed a petition for review. Petition For Review (PFR) File, Tab 1. The agency has filed an untimely response opposing the petition for review. PFR File, Tab 3. We have not considered the agency's response because it did not reply to the Clerk of the Board's notice directing it to show good cause for the untimeliness. 5 C.F.R. § 1201.114(f); PFR File, Tab 4.

ANALYSIS

The appellant asserts that he was unaware of the "requirement," cited by the administrative judge, that he file his petition for enforcement within 30 days of the date of the settlement agreement. PFR at 1-2.

We find that the administrative judge erred to the extent that he dismissed the appellant's petition for enforcement as untimely on that basis. The administrative judge inconsistently found that, to be considered timely, the petition for enforcement must have been filed within 30 days of the date of the settlement agreement, C.I.D. at 2, and within a reasonable period of time after the appellant discovered the alleged breach of the settlement agreement, C.I.D. at 3. The correct standard, however, is as follows: A petition for enforcement of a settlement agreement must be filed within a reasonable time of the date of the alleged breach of the agreement, taking into consideration the date of the petitioning party's knowledge of the alleged breach and the particular circumstances of the case. *See, e.g., Tarin v. Department of the Army*, 70 M.S.P.R. 234, 239 (1996); *Warren v. Department of the Navy*, 68 M.S.P.R. 244, 246 (1995). Thus, we will consider the issue of timeliness under the correct standard.

The administrative judge found that the appellant's sole submission asserted that his untimeliness should be waived because the agency allegedly breached the settlement agreement in 1989. He found that the appellant presented no evidence or argument explaining why he waited nearly 6 years to file his present petition for enforcement. Thus, he concluded that the appellant had not provided a basis for waiving the filing deadline. C.I.D. at 2-3.

Although the administrative judge's description of the appellant's assertion is reasonable, *see* CF3, Tab 5, it appears that the administrative judge may have misinterpreted the intent of the appellant's argument. Given the appellant's pro se status, we have attempted to interpret his petition for enforcement in the way most favorable to his position. *See, e.g., Dinkins v. Office of Personnel Management*, MSPB Docket No. AT-0845-95-1097-I-1, slip op. at 4-5 (May 6, 1996).

The petition for enforcement can be read as asserting that the agency breached item 6 of the 1989 settlement agreement, which provided that the appellant would be placed on sick leave from December 2, 1987, through January 28, 1988, IAF, Tab 12, by informing the Office of Workers' Compensation Programs (OWCP) that his removal

was for cause. He asserts that the agency's action prevented him from receiving benefits from OWCP for this time period. CF3, Tab 1. He submitted decisions from OWCP and the Employees' Compensation Appeals Board (ECAB) concerning his request for benefits. The last decision, from the ECAB, was issued October 4, 1995. *Id.* Thus, it appears that the appellant may have filed his petition for enforcement because of the ECAB's decision.

Nonetheless, we find that the appellant has failed to show good cause for the untimely filing of his petition for enforcement. To begin with, although the appellant asserts that the ECAB affirmed OWCP's decision in a letter dated December 10, 1995, CF3, Tab 5, the only document from ECAB, as noted above, is dated October 4, 1995. Thus, even if the appellant is asserting that he did not discover the alleged breach until the ECAB issued its decision, he has not explained why he waited more than 2 months to file his petition for enforcement.

Furthermore, we find that the October 4, 1995 ECAB decision should not be the starting point for determining whether the appellant filed his petition for enforcement within a reasonable period of time after learning of the alleged breach. In a March 1, 1993 OWCP decision and supporting memorandum submitted by the appellant, OWCP noted that the appellant's removal from the agency was "for 'cause' unrelated to his approved injury" and that the appellant did not show that he was disabled from working during the period of time that was covered by item 6 of the 1989 settlement agreement. CF3, Tab 1. Thus, the appellant was made aware of the alleged breach of the settlement agreement over 2 and 1/2 years before his present petition for enforcement. Under these circumstances, we find that he has failed to show good cause for the untimely filing of his petition for enforcement. *See, e.g., Bostick v. Department of Health & Human Services*, 63 M.S.P.R. 399, 401-02 (1994). The appellant's pursuit of his claims through other agencies similarly provides no basis for waiving the filing deadline. *See, e.g., Shimmin v. Department of Justice*, 63 M.S.P.R. 435, 438, *aff'd*, 43 F.3d 1486 (Fed. Cir. 1994) (Table); *Criddell v. U.S. Postal Service*, 60 M.S.P.R. 30, 33-34 (1993).

In his petition for review, the appellant also asserts that the agency, apparently by its alleged disclosure to OWCP, breached paragraph 10 of the settlement agreement, which provides, in part, that the "conditions of this agreement are mutually dependent and inseparable." PFR at 1-2; IAF, Tab 12. The appellant has not shown that this contention is relevant to the issue of the timeliness of the petition for enforcement. Also, the record does not show that the appellant raised this argument below, or that it is based on new and material evidence that was previously unavailable despite his due diligence. Thus, we will not consider it on review. *See, e.g., Spates v. U.S. Postal Service*, 68 M.S.P.R. 9, 12 (1995).

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,
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
Washington, D.C.