

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2014 MSPB 29**

Docket No. SF-0752-13-1979-I-1

**Gerald Palermo, Jr.,
Appellant,
v.
Department of the Navy,
Agency.**

April 25, 2014

Robert Lillis, JBPHH, Hawaii, for the appellant.

Ernest J. James, Esquire, JBPHH, Hawaii, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that sustained the agency's indefinite suspension action. For the reasons set forth below, the appellant's petition for review is DISMISSED as untimely filed without good cause shown. [5 C.F.R. § 1201.114](#)(e), (g).

BACKGROUND

¶2 The agency indefinitely suspended the appellant effective July 19, 2013, following the suspension of his security clearance, for the charge of failure to meet a condition of employment. Initial Appeal File (IAF), Tab 4 at 5-7, 17-22,

29-32. The appellant filed an appeal of his indefinite suspension. IAF, Tab 1 at 4, 12-13. After holding a hearing, the administrative judge issued an initial decision affirming the indefinite suspension. IAF, Tab 15, Initial Decision (ID). The appellant has filed an untimely petition for review. Petition for Review (PFR) File, Tab 1. The agency has responded to the petition. PFR File, Tab 3.

ANALYSIS

The claimed difficulties with the e-Appeal system do not excuse the untimely filing of the petition for review.

¶3 A petition for review generally must be filed within 35 days after the date of the issuance of the initial decision, or if the party filing the petition shows that the initial decision was received more than 5 days after it was issued, within 30 days after the party received the initial decision. [5 C.F.R. § 1201.114\(e\)](#). Because the initial decision was issued on November 20, 2013, and December 25, 2013 was a federal holiday, the petition for review was due by December 26, 2013.¹ The appellant filed his petition for review 7 days late, on January 2, 2014. ID at 5; PFR File, Tabs 1, 2. The appellant's representative claims that he received the initial decision on December 24, 2013. PFR File, Tab 1 at 3. However, because the appellant and his representative were registered e-filers, they are deemed to have received the initial decision on the date of electronic submission, November 20, 2013. ID at 1, 11-13; [5 C.F.R. § 1201.14\(m\)\(2\)](#).

¶4 The Board will waive the time limit for filing a petition for review only upon a showing of good cause for the delay in filing. [5 C.F.R. §§ 1201.113\(d\)](#),

¹ Although the agency and the Clerk of the Board correctly noted that the initial decision would ordinarily have become final on December 25, 2013, because of the federal holiday, the initial decision became final on December 26, 2013. ID at 5; PFR File, Tab 2 at 1; Tab 3 at 4; *see also* [5 C.F.R. § 1201.23](#) (if the last day on which a filing deadline falls is a Saturday, Sunday, or federal holiday, the filing period will include the first workday after that date). Therefore, the appellant's petition for review was due on or before December 26, 2013.

1201.114(f). The party who submits an untimely petition for review has the burden of establishing good cause for the untimely filing by showing that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Sanders v. Department of the Treasury*, [88 M.S.P.R. 370](#), ¶ 5 (2001). To determine whether a party has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and the party's showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62–63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶5 The appellant's representative claims that he erroneously saved the petition for review in the Board's e-Appeal system as a draft on December 23, 2013, instead of submitting it. PFR File, Tab 4 at 4. Under limited circumstances, the Board will excuse delays in filing caused by difficulties encountered with the e-Appeal system. *E.g.*, *Salazar v. Department of the Army*, [115 M.S.P.R. 296](#), ¶¶ 6-8 (2010) (excusing a filing delay where the appellant alleged that he attempted to electronically file his petition for review on time and the e-Appeal system showed that the appellant had, in fact, accessed the system prior to the date that his petition was due; it was possible to exit the system without receiving a clear warning that he had not yet filed his pleading; and once he became aware that his petition had not been filed, the appellant contacted the Board and submitted a petition for review that included an explanation of his untimeliness); *Lamb v. Office of Personnel Management*, [110 M.S.P.R. 415](#), ¶ 9 (2009) (excusing the untimely filing of an appeal where the appellant reasonably believed he filed timely by completing all the questions on the on-line appeal form and exited the website without receiving a clear warning that his appeal was not filed); *Livingston v. Office of Personnel Management*, [105 M.S.P.R. 314](#), ¶ 9

(2007) (finding good cause for the untimely filing of a petition for review in the e-Appeal system where the appellant created a draft of the petition, was able to exit the Board's website without receiving a clear warning that he had not yet filed his pleading, and acted with due diligence in submitting the relevant documents when he became aware of the problem). However, we do not find that the appellant's failure to complete the submission is excusable in this instance.

¶6 According to the Board's e-Appeal logs, the appellant's representative initially created and saved a version of the petition for review in the e-Appeal system on December 21, 2013. He logged onto the system again on December 23, 2013, but neither revised nor submitted the petition. The appellant's representative has represented him throughout the process. IAF, Tab 1 at 3. Further, from the time he filed his appeal, the appellant and his representative have both been registered e-filers. *Id.* at 2-3. Prior to filing the petition for review, the representative successfully filed four pleadings in e-Appeal. IAF, Tabs 7, 10, 13, 14. According to the e-Appeal database, after each filing, the e-Appeal system generated an email within minutes to the appellant, his representative, and the agency's representative, advising them of the new pleading.

¶7 Further, when an individual saves a draft petition for review in the e-Appeal system, the system automatically generates an email to him on each of the following 3 calendar days warning that the pleading has not yet been submitted. After the appellant's representative saved his draft petition on December 21, 2013, he would have received reminders on December 22, 23, and 24, 2013. The representative should have realized that he had not successfully filed the appeal when he received the last of these three notifications on December 24, 2013, the day after he alleges he believed he had filed the petition for review. However, he did not submit the petition for review until January 2, 2014. PFR File, Tab 1.

¶8 Given their familiarity with the e-Appeal system, due diligence and ordinary prudence required that the appellant and his representative follow up to

determine the status of the petition for review when they did not receive an email advising the parties that it had been filed as they had for their past Board submissions, and when the appellant's representative received an email on December 24, 2013, warning him that his December 21, 2013 draft petition for review was not yet submitted. *Compare Walker v. Department of the Air Force*, [109 M.S.P.R. 261](#), ¶¶ 7-9 (2008) (declining to excuse a delay in filing where the appellant's attorney changed her email address without notifying the Board and did not contact the Board until 30 days after learning that the initial decision was issued), *with Boykin v. U.S. Postal Service*, [104 M.S.P.R. 460](#), ¶ 6 (2007) (excusing a delay in filing where multiple attempts were made to timely file on the day the petition for appeal was due and the petition was filed the following day, and noting that other users reported problems with the e-Appeal system during the date in question). However, the petition for review was not filed until 11 days after it was originally drafted on December 21, 2013, and 7 days after it was due. PFR File, Tab 1. Although the length of the delay was relatively short, the appellant has not shown any circumstances beyond his control such as unavoidable casualty or misfortune that affected his ability to comply with the time limits. *See Moses v. Office of Personnel Management*, [11 M.S.P.R. 68](#), 69-70 (1982) (declining to excuse a 5-day delay requested based on a pro se appellant's inability to see an attorney or to understand his appeal rights, and his failure to notice the deadline for filing a petition for review set forth in the initial decision); *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981) (an appellant is responsible for the errors of his chosen representative).

¶9 Further, the petition was not accompanied by a motion that showed good cause for its untimely filing. PFR File, Tab 1. Unless the Board has previously granted an extension, an untimely petition for review must be accompanied by such a motion, which must be accompanied by an affidavit or sworn statement that includes the reasons for failing to request an extension before the deadline for the submission, and a specific and detailed description of the circumstances

causing the late filing, accompanied by supporting documentation or other evidence. [5 C.F.R. § 1201.114](#)(g). After receiving the petition for review, the Board provided the appellant with notice of these requirements and instructed him to file the motion and accompanying documents on or before January 23, 2014, or the Board may dismiss his petition as untimely. PFR File, Tab 2 at 1-2 & attached motion form. The appellant's response to the Board's notice was 1 day late and did not include a sufficient explanation for the untimeliness of the petition.² PFR File, Tab 4;

¶10 Accordingly, we dismiss the petition for review as untimely filed. This is the final decision of the Merit Systems Protection Board regarding the timeliness of the petition for review. The initial decision remains the final decision of the Board regarding the appellant's indefinite suspension.

² Because it is not sufficient to warrant a different outcome, we decline to excuse the appellant's untimeliness based on new evidence he claims to have received on December 28, 2013. PFR File, Tab 4 at 4; *see Young v. Department of the Interior*, [76 M.S.P.R. 501](#), 503 (1997) (the discovery of new evidence, without more, does not excuse the untimely filing of a petition for review; rather, the evidence must be of sufficient weight to warrant a different outcome). The purported new evidence allegedly shows that "it wasn't the [Department of Defense Centralized Adjudications Facility] that prevented [the appellant's] return to work but the [a]gency itself." PFR File, Tab 4 at 5. The documentation provided by the appellant shows that the Centralized Adjudications Facility (CAF) restored his security clearance prior to the agency's issuance of a letter of decision on his indefinite suspension. *Id.* at 7-14. The agency provided evidence below to show that the CAF letter restoring the appellant's security clearance was rescinded 27 days later, prior to the issuance of the decision on his indefinite suspension. IAF, Tab 4 at 6-7, 13-16, 24-25, 27; Tab 9 at 7-8, 10-11. The appellant has not offered evidence to refute this rescission. Even if, as the appellant contends, the documents indicate that the agency could have returned him to work from June 18, 2013, to July 15, 2013 – the period of time during which his security clearance was briefly restored, the appellant was on administrative leave during that entire time period. IAF, Tab 4 at 24, 27, 31. His indefinite suspension had not yet begun and was unaffected by this series of events. IAF, Tab 4 at 18-22. We further note that at the time the appellant allegedly received this evidence, his petition for review was already late. We also deny the appellant's motion to submit additional evidence that purports to show, again, that his clearance was restored before the agency made a decision regarding his indefinite suspension. PFR File, Tab 8 at 4-5.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov.

Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.