

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

FLETTER DADE,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.  
(CSA 2 702 795)

DOCKET NUMBER  
PH831M8910498

DATE: APR 23 1990

Andrea B. Paul, Esquire, Harper & Paul, Philadelphia,  
Pennsylvania, for the appellant.

Retirement Policy Division, Washington, D.C., for the  
agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the initial decision issued on December 11, 1989. For the reasons set forth in this Opinion and Order, we DISMISS the appellant's petition as untimely filed.

BACKGROUND

The appellant appealed to the Board's Philadelphia Regional Office from the Office of Personnel Management's (OPM) reconsideration decision that affirmed an initial

decision finding that the appellant received an overpayment of her annuity, and declining to waive its repayment. See Petition for Appeal, Initial Appeal File (IAF) at Tab 1; see also IAF at Tab 5, Subtab 2. The administrative judge assigned to adjudicate the appeal sustained OPM's reconsideration decision in an initial decision issued on December 11, 1989. See Initial Decision at 1, IAF at Tab 8. The administrative judge noted that the initial decision would become final on January 15, 1989,\* and that would be the last day on which the appellant could timely file a petition for review. See Initial Decision at 5, IAF at Tab 8.

The appellant filed a petition for review postmarked January 17, 1990. See Petition for Review, PFR File at Tab 1. The Clerk of the Board issued a notice acknowledging the petition, noting that it appeared to be untimely filed, and affording the appellant a period of ten days to submit an affidavit showing good cause for waiver of the Board's time limits. See PFR File at Tab 2. In her response to the Clerk's notice, the appellant's attorney asserts that she mailed the petition on January 15, 1990, and that "the envelope from the office was postmarked January 15, 1990," but that the Post Office was closed because that day was a national holiday.

---

\* Due to what appears to be a typographical error, the initial decision stated that it would become final on January 15, 1989, rather than 1990. See Initial Decision at 5, IAF at Tab 8. However, the appellant has not raised this issue, and her submissions indicate that she was aware that the initial decision would become final in January 1990. See PFR File at Tab 3.

The appellant requests that the time limit be waived until January 19, 1990. See PFR File at Tab 3.

#### ANALYSIS

In accordance with 5 C.F.R. § 1201.114(d), the Board considers a petition filed on its postmark date, if mailed, or on the date of receipt by the Board, if hand-delivered. See *Randolph v. Office of Personnel Management*, 38 M.S.P.R. 323, 325 (1988); *Fogelson v. Office of Personnel Management*, 38 M.S.P.R. 9, 11 (1988). The Board may waive the deadline for filing a petition for review for good cause shown. 5 C.F.R. § 1201.12. See *Strachan v. Department of the Air Force*, 30 M.S.P.R. 501, 502 (1986). However, the appellant has the burden of proving timeliness, or good cause for the untimely filing. 5 C.F.R. § 1201.56(a)(2). See *Shiflett v. United States Postal Service*, 839 F.2d 669, 672 (Fed Cir. 1988). In *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980), the Board held that it will determine whether waiver of the time limit is appropriate, provided that the petitioning party show that he or she exercised diligence or ordinary prudence under the particular circumstances of the case. 5 C.F.R. § 1201.114(f).

Because January 15, 1990, was a legal holiday, the last day for filing a petition for review in this appeal was January 16, 1990. 5 C.F.R. § 1201.23. See *Hughes v. United States Commission on Civil Rights*, 26 M.S.P.R. 277, 278 (1985). However, notwithstanding the assertion made by the appellant's attorney that the petition was mailed on

January 15, 1990, the envelope containing the mailed petition shows a postmark of January 17, 1990. See *Petition for Review*, PFR File, at Tab 1; see also *Randolph*, at 325. Thus, the appellant's petition for review was one day late under the Board's regulations. 5 C.F.R. § 1201.114(d). See *Cantrell v. United States Postal Service*, 32 M.S.P.R. 248, 249 (1987). The affidavit submitted by the appellant's attorney does not state that she personally placed the petition for review in the mail. Rather, she states that it was mailed by "this office," and that "to the best of [her] knowledge" it was postmarked January 15, 1990. See PFR File at Tab 3. The fact that her knowledge was not first-hand, and the fact that the postmark on the petition's envelope is stamped January 17, 1990, do not provide a credible basis for finding that the petition was actually deposited in the mail on January 15, 1990. See *Randolph*, at 325.

Although the delay in this case was brief, 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. See *Goldberg v. Department of Defense*, 39 M.S.P.R. 515, 518 (1989); *Fogelson*, at 11; *Miller v. United States Marine Corps*, 21 M.S.P.R. 466, 467 (1984), *aff'd*, 765 F.2d 160 (Fed. Cir. 1985) (Table). In her affidavit, the appellant's attorney explains why the petition for review was not filed on January 15, 1990. However, she provides no explanation for the subsequent delay. The appellant's attorney states in her

affidavit that "any delay was not caused by the appellant." The appellant, however, is bound by the actions or omissions of her freely chosen representative. She must therefore bear the responsibility for her counsel's failure to file a timely petition for review. See *Randolph*, at 325, citing to *Rowe v. Merit Systems Protection Board*, 802 F.2d 434, 437-38 (Fed. Cir. 1986); compare *Dunbar v. Department of the Navy*, MSPB Docket No. SF07528910445, slip op. at 5 (Feb. 27, 1990), citing to *Primbs v. United States*, 4 Cl. Ct. 366, 370 (1984), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985) (Table), cert. denied, 471 U.S. 1068 (1985) (while an attorney's actions should be attributed to his client, it is inappropriate to apply that principle where the client proves that his diligent efforts were thwarted by his attorney's deceptions and negligence). Thus, the appellant has not shown good cause for waiver of the Board's time limit for filing a petition for review.

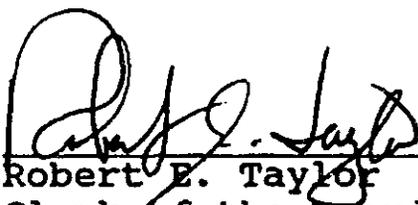
#### NOTICE TO APPELLANT

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, 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.