UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ARTICE DOTSON, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER CH07528910022 DATE: AUG 10 1989

Artice Dotson, Detroit, Michigan, pro se.

Zipporia Sloan, Detroit, Michigan, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on January 12, 1989, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS the case on its own motion pursuant to 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision AS MODIFIED herein.

BACKGROUND

The appellant was removed from his position as a City Carrier, effective September 19, 1988, for failure to meet the physical requirements of his position. He filed an appeal with the Board's Chicago Regional Office that was dated October 11, but postmarked October 12, 1988. The agency moved to dismiss the appeal as untimely filed, and in his response, the appellant contended that the appeal was timely filed on October 11, but that if it were not, then the untimeliness should be excused because the record demonstrated that he suffers from stress.

In the initial decision, the administrative judge found that the petition for appeal must have been filed by October 11 to be timely because the expiration of the appeal period, October 9, was a Sunday, and the following day was a federal holiday. Finding that appellant's mere assertion that he brought his appeal to the post office and mailed it on October 11 was insufficient to overcome the evidence that the appeal had not been mailed until October 12, specifically, the postage meter strip dated October 12 that was affixed to the envelope in which the appeal was filed, the administrative judge concluded that the appeal was untimely filed. The administrative judge then applied the Board's decision in *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180 (1980), in order to determine whether the Board should waive the untimeliness. He found, however, that the appellant advanced no specific information or

evidence to establish a valid excuse for the delay, and demonstrated no unavoidable casualty or misfortune interfering with the timely filing of the appeal. Having concluded that good cause for the delay was not shown, the administrative judge did not consider whether the agency would be prejudiced by the acceptance of the appeal.

In his petition for review, the appellant reiterates that the appeal was timely filed because he brought it to the post office and mailed it on October 11, 1988, and that he does not know why the postmark date is October 12. He also argues that he was verbally informed by his supervisor that he had one month to appeal to the Board, that he was under great stress at the time, and that the agency would not be prejudiced by the acceptance of his appeal.

The agency has responded in opposition to the petition and the appellant has filed a reply to the response.[1]

ANALYSIS

The Board finds that the petition fails to meet the criteria for review set forth at 5 C.F.R. § 1201.115 because its simple reargument that the petition was timely mailed is insufficient to overcome the evidence of record showing that the post office stamped the letter, which the appellant

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[1] The Board's regulations do not provide for the consideration of a reply to a response to the petition for review. *See* 5 C.F.R. § 1201.114(i). Nonetheless, because the reply simply reiterates arguments made in the petition, and in light of the reason we have reopened the appeal, we have not excluded this submission from our review.

admittedly brought to it to secure proper postage, as received on October 12. Such disagreement with the findings of the administrative judge, unsupported by evidence, provides no basis for review. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (the Board must give due deference to the credibility and fact findings of the administrative judge), *review denied*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*).

Similarly, while the administrative judge did not specifically discuss the appellant's assertion that he suffers from stress, we find no error in his conclusion that the appellant presented no specific information or evidence to excuse the delay. Initial Decision at 5. The conclusory assertion that he was under stress due to the removal fails to show that he could not have filed his petition timely and is, to some extent, contradictory to his argument that, in fact, he mailed the petition on time. The appellant's submission with his petition for review of a medical certificate stating that he was under care for depression and capable of returning to work on January 8, 1988, constitutes neither new nor material evidence. The certificate was already of record and is clearly insufficient to justify the delayed filing, due both to its date and its contents.

Moreover, the appellant's argument for the first time in his petition for review and reply to the agency's response that the delay should be excused because his

supervisor told him that he had "about a month" to file his appeal also provides no basis for review. The appellant has not explained why he did not bring this argument to the attention of the administrative judge. Nor, even if he had done so, does he explain why such an inexplicit statement by his supervisor would cause him to ignore the specific statement in the decision letter that he had 20 days in which to file his appeal and that, if he had questions concerning the procedure for appealing to the Board, he should contact the Postmaster. *See Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence); *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that the new evidence is of sufficient weight to warrant an outcome different from that of the initial decision).

We have reopened the appeal, however, because we note that the administrative judge stated that in the October 18, 1988 Acknowledgement Order, he afforded the appellant an opportunity to present evidence and argument showing why the time limit should be waived. That Order states:

> If there is a question as to whether your appeal is timely filed or within the Board's jurisdiction, this Order gives you the opportunity to submit evidence to establish timeliness, good cause to waive the time limit, or jurisdiction.

Appeal File, Tab 2 at 1.

Because the Order does not specify that there was a question as to the timeliness of the appeal, and because the appellant apparently believed that the appeal was timely, the Board finds that he was not provided, by this Order, with a fair opportunity to respond to the timeliness issue. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641 (Fed. Cir. 1985), holding that the Board must provide the appellant a fair opportunity to make the required jurisdictional showing before dismissing his appeal.

Nonetheless, the agency's motion to dismiss, to which the appellant responded, put him on notice of the defect in his filing; the parties participated in a conference call and discussed the issue; the administrative judge subsequently issued a close of the record notice providing the appellant with a final opportunity to speak to the issue; the initial decision discusses the Board's standards for good cause; and the Board has fully considered the appellant's arguments set forth in his petition for review. Because we conclude that the record fails to demonstrate good cause for the untimeliness and that the dismissal was therefore proper,[2] we find that any error by the administrative judge in this regard was not prejudicial to

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[2] The appellant's assertion that the agency would not be prejudiced by the delay is, as found by the administrative judge, irrelevant in light of the Board's conclusion that good cause for the delay or a showing sufficient to require a hearing has not been demonstrated. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

the appellant. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE 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:

/s/ Robert E. Taylor
Clerk of the Board

Washington, D.C.