

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

**2009 MSPB 112**

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Docket No. PH-0752-06-0385-I-1  
PH-0752-06-0588-I-1

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**Rodger L. Jones,**

**Appellant,**

**v.**

**Social Security Administration,**

**Agency.**

June 17, 2009

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Rodger L. Jones, Philadelphia, Pennsylvania, pro se.

Michelle D. Scotese, Esquire, Philadelphia, Pennsylvania, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant petitions for review of the initial decisions, issued July 11, 2006, and December 8, 2006, in his appeals in MSPB Docket Nos. PH-0752-06-0385-I-1 (0385) and PH-0752-06-0588-I-1 (0588). We join these appeals for adjudication pursuant to [5 C.F.R. § 1201.36](#), and DISMISS the appellant's petitions as untimely filed without a showing of good cause for the filing delays.

**BACKGROUND**

¶2 On April 19, 2006, the appellant filed an appeal of his removal. 0385 Appeal File, Tab 1. The agency, however, informed the administrative judge that

it had rescinded the removal and was returning the appellant to duty and placing him on a paid non-duty status effective the date of his removal. 0385 Appeal File, Tab 6. The administrative judge afforded the appellant opportunities to show why the appeal should not be dismissed as moot and to participate in a conference, but the appellant did not respond. 0385 Appeal File, Tabs 10, 12, 13 at 2. The administrative judge then determined that the appeal was moot and dismissed it in an initial decision issued July 11, 2006. 0385 Appeal File, Tab 13. The initial decision also informed the appellant that it would become final on August 15, 2006, unless a party filed a petition for review. *Id.* at 3.

¶3 In the meantime, the agency again effected the appellant's removal on June 23, 2006. 0588 Appeal File, Tab 7, subtab 4a. The administrative judge issued an initial decision on December 8, 2006, that sustained the appellant's removal and informed the parties that the initial decision would become final on January 12, 2007, unless a party filed a petition for review. 0588 Appeal File, Tab 22. In issuing the initial decision, the administrative judge also noted that, although the appellant had requested a hearing, he neither appeared for the hearing, responded to the show cause order for his failure to appear, filed prehearing submissions, participated in discovery or the prehearing telephonic conference, nor submitted written evidence prior to the record's close. *Id.* at 2.

¶4 In early 2009, the appellant contacted the Office of the Clerk of the Board to ascertain the status of his various appeals, including appeals not at issue here. 0385 Petition for Review File, Tabs 1-3; 0588 Petition for Review File, Tabs 1-3. By letter dated February 20, 2009, the Clerk's Office explained that an initial decision had been issued in the appellant's 0385 appeal on July 11, 2006, and that an initial decision had also been issued in the 0588 appeal on December 8, 2006. 0385 Petition for Review File, Tab 3; 0588 Petition for Review File, Tab 3. The Clerk's Office further stated that it had already provided the appellant with copies of those initial decisions with its October 30, 2008 response to the appellant's previous correspondence, and that both decisions advised the appellant of the

time and place for filing a petition for review. 0385 Petition for Review File, Tab 3; 0588 Petition for Review File, Tab 3. Finally, the Clerk's Office informed the appellant that, if he wanted to file a petition for review in these appeals, he must inform the Clerk's Office by March 17, 2009, that a petition in either case would appear to be untimely filed, and that he should include a motion to accept the filing as timely or to waive the time limit for good cause. 0385 Petition for Review File, Tab 3; 0588 Petition for Review File, Tab 3.

¶5 On March 17, 2009, the appellant filed a petition for review for both appeals. 0385 Petition for Review File, Tab 4; 0588 Petition for Review File, Tab 4. The petition included a motion to accept the petition as untimely filed and to waive the filing time limits. 0385 Petition for Review File, Tab 4; 0588 Petition for Review File, Tab 4.

¶6 The motion stated that the appellant had not received any information about his second removal appeal, that he became homeless in August 2007 and did not receive information from the Board or the agency, and that, before he became homeless, the Board and the agency were sending information to the wrong address and should have received those mailings back as undeliverable. 0385 Petition for Review File, Tab 4; 0588 Petition for Review File, Tab 4. The appellant further claimed that, after he found housing, he had been in contact with both the regional office and the Board's headquarters since June 2008 regarding his appeal, and was told that his case was closed and that he should contact the Board's headquarters. 0385 Petition for Review File, Tab 4; 0588 Petition for Review File, Tab 4. The appellant also stated that he then filed a Freedom of Information Act (FOIA) request to obtain documents related to his appeal, received that information in February 2009, and then filed his petition for review for both appeals on March 17, 2009. 0385 Petition for Review File, Tab 4; 0588 Petition for Review File, Tab 4. The appellant also submitted various documents that purportedly support his claim that he did not receive information about his

appeal due to mailing issues. 0385 Petition for Review File, Tab 4; 0588 Petition for Review File, Tab 4.

### ANALYSIS

¶7 To be timely, a petition for review must be filed within 35 days after the initial decision was issued, or, if the appellant shows that the initial decision was received more than 5 days after the initial decision was issued, within 30 days after the date the appellant received the initial decision. [5 C.F.R. § 1201.114\(d\)](#).

¶8 The Board will waive the filing time limit only upon a showing of good cause for the delay. [5 C.F.R. §§ 1201.12](#), 1201.114(f). To establish good cause, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). The Board will consider the length of the delay, the reasonableness of the appellant's excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune that prevented him from timely filing 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).

¶9 Here, the appellant was required to have filed his petition for review in his 0385 appeal by August 15, 2006. 0385 Appeal File, Tab 13 at 3. He was also required to have filed his petition for review in his 0588 appeal by January 12, 2007. 0588 Appeal File, Tab 22 at 10. The appellant did not file his petition in either appeal until March 17, 2009. 0385 Petition for Review File, Tabs 4, 5; 0588 Petition for Review File, Tabs 4, 5. This is a significant delay, and the Board considers the length of the delay in every good cause determination. *See Walls v. Merit Systems Protection Board*, [29 F.3d 1578](#), 1582 (Fed. Cir. 1994).

¶10 The appellant's claims, that he did not receive documents, that there was confusion regarding his address, and that he was homeless for some of the time in

question, do not show good cause for his filing delay. The record shows that the vast majority of pertinent documents in his appeals, including both initial decisions, were served on the appellant's residence of record. 0385 Appeal File, Tabs 11, 13; 0588 Appeal File, Tabs 1, 4, 5, 10, 11, 13, 16, 22. Further, by the appellant's own admission, he did not become homeless until after the deadline for filing a petition for review had passed in both cases. 0385 Petition for Review File, Tab 4; 0588 Petition for Review File, Tab 4. While the appellant claims that he did not receive any of the pertinent documents concerning his second removal appeal, we note that the appellant has significant prior experience with Board procedures, having appealed a prior action concerning another agency and pursued three compliance appeals stemming from that appeal. *Jones v. Department of Health & Human Services*, MSPB Docket No. PH-0752-02-0381-C-3 (Apr. 22, 2009); *Jones v. Department of Health & Human Services*, MSPB Docket No. PH-0752-02-0381-C-2 (June 6, 2005); *Jones v. Department of Health & Human Services*, MSPB Docket No. PH-0752-02-0381-I-2 (June 6, 2005); *Jones v. Department of Health & Human Services*, [96 M.S.P.R. 537](#) (2004) (Table); *Jones v. Department of Health & Human Services*, MSPB Docket No. PH-0752-02-0381-I-1 (Nov. 19, 2002) (Initial Decision). This experience should have alerted the appellant to possible problems regarding service of documents, and his failure to note these problems breached his personal duty to monitor the progress of his appeals at all times. *Miller v. Department of Homeland Security*, [110 M.S.P.R. 258](#), ¶¶ 12, 14 (2008).

¶11 The appellant's arguments, that he needed to await the results of his FOIA request before filing his petition for review and that he timely filed his petitions upon receiving the FOIA response, are also without merit. The appellant admits that he initiated his FOIA requests after the regional office informed him in June of 2008 that his appeals were closed and that he needed to contact the Board's headquarters. 0385 Petition for Review File, Tab 4. The decision to delay contacting the Board after receiving notice regarding the problems with the status

of the appeal does not show due diligence warranting a finding of good cause. See *Miller*, [110 M.S.P.R. 258](#), ¶ 13; *Groesbeck v. Office of Personnel Management*, [109 M.S.P.R. 1](#), ¶ 4 (2008). Further, even though the appellant was pro se, his belief that he needed to obtain information pursuant to a FOIA request does not excuse the delay, nor does it explain the failure to seek an extension of time to file a petition for review in advance. See *Bocock v. Department of the Navy*, [85 M.S.P.R. 241](#), ¶ 5 (2000); *Comer v. Department of Veterans Affairs*, [78 M.S.P.R. 633](#), ¶ 6 (1998), *aff'd*, 178 F.3d 1313 (Fed. Cir. 1999) (Table); *Criddell v. U.S. Postal Service*, [60 M.S.P.R. 30](#), 33 (1993) (an appellant's effort to gather information that was believed to support the case does not establish good cause for a waiver of the filing deadline).

¶12 Accordingly, we find that the appellant has not shown that he timely filed his petition for review in these appeals, or that good cause exists for the filing delay. We, therefore, dismiss the petition for review for both appeals as untimely filed.

#### ORDER

¶13 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review in both appeals. The initial decisions remain the final decisions of the Board concerning the mootness issue in the 0385 appeal, and the merits of the appellant's removal in the 0588 appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

#### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://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:

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