

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

**2009 MSPB 195**

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Docket No. CH-844E-08-0713-I-1

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**Frederick Goodman,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 8 350 555

October 1, 2009

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Kevin A. Graham, Esquire, Liberty, Missouri, for the appellant.

Camela Green-Brown, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal without prejudice to refile. For the reasons set forth below, we find that the petition is untimely filed without a showing of good cause for the delay, and we therefore DISMISS it. We also FORWARD the appellant's submissions on petition for review to the Central Regional Office for docketing as a refiled appeal.

### BACKGROUND

¶2 On August 13, 2008, the appellant timely appealed from a reconsideration decision of the Office of Personnel Management (OPM) denying his application for disability retirement under the Federal Employees' Retirement System (FERS). Initial Appeal File (IAF), Tab 1. On November 5, 2008, the appellant filed a motion to dismiss the appeal "without prejudice to [his] right to re-file within 90 days of the dismissal" to allow him time to explore the possibility of applying for a regular FERS annuity. IAF, Tab 7 at 2. The administrative judge granted the request in an initial decision issued the following day. IAF, Tab 8, Initial Decision (ID) at 2-3.

¶3 On June 24, 2009, nearly 8 months after the administrative judge dismissed the appeal, the appellant, pro se, filed a petition for review form with the Clerk of the Board which was blank except for a mark indicating that it was being filed after the initial decision's finality date. Petition for Review File (PFRF), Tab 1 at 2. The Clerk notified the appellant that his petition for review appeared to be untimely filed and that he must submit a motion for waiver of the time limit and either an affidavit or a statement, signed under penalty of perjury, stating why there is good cause for the late filing. PFRF, Tab 2.

¶4 The appellant thereafter submitted a motion to waive the time limit, in which he appears to be asserting that he was not advised of the initial decision's finality date, and that he was not advised that he had "60 days to appeal the . . . final decision" of the administrative judge. *See* PFRF, Tab 3 at 6. The motion also appears to refer to the date on which the appellant received OPM's reconsideration decision. *See id.*

### ANALYSIS

¶5 A petition for review must generally be filed within 35 days after the date of issuance of the initial decision 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). The appellant in this case did not file his petition for review until more than 6 months after that deadline, as we have noted above, and he does not allege that he received the initial decision more than 5 days after it was issued. The petition therefore is untimely.

¶6 The Board will waive its time limit for filing petitions for review only upon a showing of good cause for the delay in filing. [5 C.F.R. §§ 1201.12, 1201.114](#)(f). To establish good cause for the untimely filing of a petition, 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). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his 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).

¶7 The initial decision in this case included information about two filing deadlines, i.e., the deadline by which the appellant could refile his appeal and the deadline by which he could obtain Board review of the initial decision by filing a petition for review. ID at 2-3. Although the administrative judge did not identify the finality date of December 11, 2008, in the part of the initial decision in which he addressed the appellant's right to refile the appeal, that date was clearly identified in the part of the initial decision that provided instructions concerning the appellant's right to file a petition for review. *See* ID at 2-3.

¶8 The Board has declined to find good cause for a waiver of the filing time limit where, as here, the initial decision clearly notified the appellant of the correct time limit for filing a petition for review. *See Valdez v. Office of*

*Personnel Management*, [103 M.S.P.R. 88](#), ¶ 7 (2006). Further, notwithstanding the appellant's pro se status, a delay of 6 months is not minimal. *See, e.g., Dean v. U.S. Postal Service*, [100 M.S.P.R. 556](#), ¶ 5 (2005); *Gaines v. U.S. Postal Service*, [96 M.S.P.R. 504](#), ¶ 7 (2004) (a delay of 37 days is not minimal).

¶9 The appellant' motion to set aside or waive the time limit fails to establish good cause for his failure to file his petition for review until more than 6 months after the date the initial decision became the final decision of the Board. Accordingly, we DISMISS the appellant's petition for review as untimely filed without a showing of good cause for the untimely filing. *See Valdez*, [103 M.S.P.R. 88](#), ¶ 7.

¶10 We note, however, that the appellant appears to be attempting to refile his appeal. He raises no objection to the administrative judge's dismissal of his appeal without prejudice, and his apparent assertion that he was not advised of the initial decision's finality date seems to be based on the absence of any reference to that date in the part of the decision advising the appellant of his right to refile his appeal. Under these circumstances, we find that the appellant's submissions on petition for review should be treated as a refiled appeal. *See Starling v. Department of Veterans Affairs*, [74 M.S.P.R. 254](#), 256-57 (1997); *Cloonan v. U.S. Postal Service*, [70 M.S.P.R. 226](#), 228-29 (1996).

¶11 Accordingly, we FORWARD the appellant's petition for review for docketing as a refiled appeal.\*

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\* Because the petition was filed more than 90 days after the appeal was dismissed without prejudice, the administrative judge shall provide the appellant with an opportunity to show good cause for his apparent untimeliness. In doing so, he shall consider the appellant's apparent confusion concerning the refiling deadline, along with other factors relevant to appeals that are refiled after they were dismissed without prejudice. *See, e.g., Jackson v. Office of Personnel Management*, [89 M.S.P.R. 302](#), ¶¶ 6-10 (2001); *Brown v. Office of Personnel Management*, [86 M.S.P.R. 417](#), ¶ 8 (2000).

ORDER

¶12 This is the final decision of the Merit Systems Protection Board with respect to the petition for review of the initial decision in this 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.ca9.uscourts.gov](http://www.ca9.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.