

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

2009 MSPB 213

Docket No. SF-0845-09-0267-I-1

**Lwanda Okello,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 8 308 541

October 27, 2009

Lwanda Okello, Seattle, Washington, pro se.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

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

Chairman McPhie issues a separate, concurring opinion.

OPINION AND ORDER

¶1 The appellant has filed a request to reopen a decision to grant his request to withdraw his earlier-filed petition for review. For the reasons set forth below, we DENY that request. Further, we also treat the request to reopen as an untimely filed petition for review and, as such, we DISMISS the appellant's submission as untimely filed with no good cause for the delay shown.

BACKGROUND

¶2 The appellant, who had retired under the Federal Employees' Retirement System, filed an appeal of the Office of Personnel Management's (OPM) reconsideration decision finding that he had been overpaid \$7,635.82 in annuity benefits. Initial Appeal File (IAF), Tab 1. During proceedings before the administrative judge, OPM rescinded its reconsideration decision. IAF, Tab 12. The administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 14; *see Brown v. Office of Personnel Management*, [51 M.S.P.R. 261](#), 263 (1991) (where OPM has completely rescinded its reconsideration decision, the Board no longer has jurisdiction over the appeal in which that decision was at issue).

¶3 The appellant petitions for review. Petition for Review File (RF), Tab 1. The agency has responded in opposition to the appellant's petition. RF, Tab 9.

ANALYSIS

¶4 The appellant filed his petition for review on June 5, 2009. RF, Tab 1. By submission postmarked June 19, 2009, the appellant made a request to withdraw his petition. RF, Tab 3. The Clerk granted the appellant's request and dismissed the petition. RF, Tab 4. Subsequently, by submission postmarked July 13, 2009, the appellant filed a request to reopen his appeal. RF, Tab 7. The request was accompanied by a motion to accept the filing as timely or to waive the time limit. *Id.*

¶5 The Board has found that it is appropriate to treat a request for reconsideration of an appellant-initiated withdrawal of a petition for appeal as a request to reopen and reinstate the withdrawn action. *Luellen v. U.S. Postal Service*, [88 M.S.P.R. 11](#), ¶ 6 (2001), *review dismissed*, 13 F. App'x 961 (Fed. Cir. 2001). Similarly, we treat the appellant's July 13, 2009 submission as a request to reopen and reinstate his prior petition for review. We find that the withdrawal of a petition for review is an act of finality that has the effect of removing the appeal from the Board's jurisdiction. *See Thomas v. U.S. Postal Service*, [71](#)

[M.S.P.R. 474](#), 477 (1996). The Board will give effect to the withdrawal of a petition for review, *see Tat v. U.S. Postal Service*, [111 M.S.P.R. 266](#), ¶ 4 (2009), and, absent unusual circumstances such as misinformation or new and material evidence, will not reinstate a petition for review once it has been withdrawn, *see Dixon v. Office of Personnel Management*, [44 M.S.P.R. 331](#), 335 (1990).

¶6 The appellant bases his request to reinstate his petition on alleged new and material evidence. He asserts that, during proceedings before the administrative judge, he requested the personnel file maintained by his employing agency, the Equal Employment Opportunity Commission (EEOC). RF, Tab 7. The appellant asserts OPM's representative before the Board rejected the appellant's request for his EEOC personnel file and stated that the file was retained at the National Personnel Records Center in St. Louis, MO. *Id.* The appellant asserts that on July 11, 2009, he learned that his EEOC personnel file was not at the Personnel Records Center, but was with the EEOC in Washington, D.C. during the entire course of his appellate proceedings. *Id.* The appellant asserts that OPM should have been aware that his EEOC personnel file was in Washington, D.C. *Id.* The appellant asserts that the EEOC personnel file will show that agency officials misled him about his years of creditable service and thus misled him about the amount he could expect to receive as payment of his retirement annuity. *Id.*

¶7 As noted, the administrative judge dismissed this appeal for lack of jurisdiction after OPM rescinded its reconsideration decision. The appellant's alleged new evidence may be material to the merits of his overpayment appeal. It is not, however, material to the issue of whether the administrative judge properly dismissed the appeal for lack of jurisdiction. Thus, the appellant's new evidence does not meet the standard of new and material evidence that could form the basis of a decision to reopen or to reinstate a petition for review that has been withdrawn. Therefore, we find no basis for reconsidering or reopening the petition. *See* [5 U.S.C. § 7701](#)(e)(1)(B); *Moss v. Department of the Air Force*, [82](#)

[M.S.P.R. 309](#), ¶ 8, *aff'd*, 230 F.3d 1372 (Fed. Cir. 1999) (Table); [5 C.F.R. § 1201.118](#).

¶8 The Clerk also properly treated the appellant's July 13, 2009 submission as a petition for review. RF, Tab 8; *see Black v. Department of Housing & Urban Development*, [66 M.S.P.R. 283](#), 286 (1995) (the Board treats a request to reinstate a withdrawn petition for review as a new petition for review). To the extent that the appellant's request to reopen is a new petition for review, it was untimely filed, and the appellant has not shown good cause for its untimeliness. A petition for review must be filed within thirty-five days after the date of issuance of the initial decision. *Williams v. Office of Personnel Management*, [109 M.S.P.R. 237](#), ¶ 7 (2008); *Stribling v. Department of Education*, [107 M.S.P.R. 166](#), ¶ 7 (2007); [5 C.F.R. § 1201.114](#)(d). Here, the initial decision was issued on April 2, 2009, and to be timely, a petition for review had to be filed by May 7, 2009. IAF, Tab 14. As noted, the appellant filed his request to reinstate his petition for review on July 13, 2009.

¶9 The Board will waive the filing deadline only upon a showing of good cause for the delay in filing. *Williams*, [109 M.S.P.R. 237](#), ¶ 7; *Stribling*, [107 M.S.P.R. 166](#), ¶ 7; [5 C.F.R. § 1201.114](#)(f). To establish good cause for an untimely filing, 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 discovery of new evidence may establish good cause for the untimely filing of a petition for review "if the evidence was not readily available before the close of the record below, and if it is of sufficient weight to warrant an outcome different from that of the initial decision." *Satterfield v. U.S. Postal Service*, [80 M.S.P.R. 132](#), ¶ 5 (1998) (quoting *Boyd-Casey v. Department of Veterans Affairs*, [62 M.S.P.R. 530](#), 532 (1994)).

¶10 As noted, the appellant submitted as new evidence his discovery that his EEOC personnel file had been available during the time that his appeal was

pending before the administrative judge, and he asserted that, despite his due diligence, he had previously been unable to learn that information. Assuming that the appellant's EEOC personnel file is new evidence, under [5 C.F.R. § 1201.115](#)(d) the Board will not consider evidence submitted for the first time with a petition for review absent a showing that it is both new and material. As explained above, the EEOC personnel file is not material to the issue before us – of whether the administrative judge correctly dismissed the appellant's appeal for lack of jurisdiction, and it is not of sufficient weight to warrant an outcome different from that of the initial decision. *Id.* Accordingly, we dismiss the appellant's July 13, 2009 submission as an untimely filed petition for review.

ORDER

¶11 This is the final order of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board. [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. 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.

CONCURRING OPINION OF NEIL A. G. MCPHIE

in

Lwanda Okello v. Office of Personnel Management

MSPB Docket No. SF-0845-09-0267-I-1

¶1 I agree with the Board's opinion treating the appellant's July 13, 2009 submission requesting to reinstate his withdrawn petition for review as a new petition for review and dismissing it as untimely filed without a showing of good cause for delay. That approach is consistent with Board precedent. *See Black v. Department of Housing & Urban Development*, [66 M.S.P.R. 283](#), 286 (1995).

¶2 In my view, however, it is unnecessary to also analyze the appellant's July 13, 2009 submission as a request to reopen the decision to grant his request to withdraw his earlier-filed petition for review and reinstate his petition for review.

Neil A. G. McPhie
Chairman