

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

2010 MSPB 57

Docket No. CH-3443-09-0061-B-1

**Amber M. Rothlisberger,
Appellant,**

v.

**Department of the Army,
Agency.**

March 23, 2010

Amber M. Rothlisberger, Sparta, Wisconsin, pro se.

Gary F. Baumann, Fort Campbell, Kentucky, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed an apparently untimely petition for review (PFR) of a remand initial decision dismissing her appeal of an indefinite suspension as untimely filed. For the reasons set forth below, we DISMISS the PFR as untimely filed without a showing of good cause for the delay.

BACKGROUND

¶2 The appellant appealed from an indefinite suspension, and the administrative judge affirmed the agency's action. Initial Appeal File (IAF), Tab 6. On PFR, the Board vacated the administrative judge's decision and

remanded the appeal for further proceedings on jurisdiction and timeliness. *Rothlisberger v. Department of the Army*, [111 M.S.P.R. 662](#), ¶ 18 (2009). On remand, the administrative judge dismissed the appeal as untimely, i.e., filed more than 1 year after the filing deadline, without a showing of good cause for the delay. Remand Appeal File (RAF), Tab 11 at 7-8. The administrative judge issued her decision on November 23, 2009, and it became final 35 days later on December 28, 2009. *Id.* at 8.

¶3 On January 11, 2010, the appellant filed a PFR with arguments regarding the merits of her indefinite suspension. PFR File, Tab 1. The Clerk of the Board (Clerk) issued a notice informing the appellant that her petition appeared to be untimely and providing direction on how to submit a motion seeking a waiver of the time limit. *Id.*, Tab 2. The appellant did not respond to the Clerk's notice.

ANALYSIS

¶4 To be timely, a petition for review must be filed within 35 days after the administrative judge issued the initial decision, or if the appellant shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date of receipt. *Lawson v. Department of Homeland Security*, [102 M.S.P.R. 185](#), ¶ 5 (2006); [5 C.F.R. § 1201.114\(d\)](#). The Board will waive the time limit for filing only upon a showing of good cause for the delay. *Olivares v. Merit Systems Protection Board*, [17 F.3d 386](#), 388 (Fed. Cir. 1994); [5 C.F.R. §§ 1201.12, 1201.114\(f\)](#).

¶5 To establish good cause for a delay in filing, a party must show that she 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 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); *Walker v. Department of the Air Force*, [109 M.S.P.R. 261](#), ¶ 5 (2008). In addition to the length of the delay, the Board considers the reasonableness of the

appellant's excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune that prevented her from timely filing her petition. *See, e.g., Walls*, 29 F.3d at 1582; *Wyerowski v. Department of Transportation*, [106 M.S.P.R. 7](#), ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶6 There is no evidence or argument in the record of this case to justify the appellant's delay in filing her PFR. The petition is silent as to a reason for the delay, and the appellant has provided no explanation for the late filing in response to the Clerk's notice. Therefore, there are no grounds for finding good cause for the filing delay. *See Mendoza v. Office of Personnel Management*, [43 M.S.P.R. 427](#), 429, *aff'd*, 918 F.2d 187 (Fed. Cir. 1990) (Table). The appellant has failed to show that she exercised the due diligence or ordinary prudence that would justify waiving the deadline for filing a PFR.

¶7 We note that the appellant is pro se and that her 14-day delay is not very lengthy. Nevertheless, the delay is not minimal. *Gonzalez v. Department of Veterans Affairs*, [111 M.S.P.R. 697](#), ¶ 11 (2009) (finding 8-day delay not minimal). Moreover, the Board has consistently denied a waiver of the filing deadline even where the delay is not lengthy and the appellant is pro se, if no good reason for an untimely filing is shown. *See, e.g., id.*; *Scott v. Social Security Administration*, [110 M.S.P.R. 92](#), ¶ 8 (2008) (finding no good cause for unexplained 11-day delay).

¶8 Moreover, the initial decision informed the appellant that it would become the final decision of the Board in 35 days, i.e., on December 28, 2009, unless a PFR was filed by that date. RAF, Tab 11 at 8. The Board has declined to find good cause for an untimely filing where, as here, the initial decision clearly notified the appellant of the time limit within which to file a PFR, and the appellant failed to do so. *Guevara v. Department of the Navy*, [112 M.S.P.R. 39](#),

¶ 7 (2009); *Crook v. U.S. Postal Service*, [108 M.S.P.R. 553](#), ¶ 6, *aff'd*, 301 F. App'x 982 (Fed. Cir. 2008).

¶ 9 We therefore DISMISS the appellant's petition for review as untimely filed without a showing of good cause for the delay.

ORDER

¶ 10 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. 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. 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.