

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

**2010 MSPB 74**

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Docket Nos. SF-1221-09-0862-W-1  
SF-1221-05-0393-W-2

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**Catherine M. Pacilli,**

**Appellant,**

**v.**

**Department of Veterans Affairs,**

**Agency.**

April 23, 2010

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Catherine M. Pacilli, Fresno, California, pro se.

Donald C. Philips, Esquire, San Francisco, California, 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 a petition for review of the September 21, 2009 initial decision that dismissed her individual right of action (IRA) appeal, filed on August 2, 2009, as untimely filed with no good cause shown for the delay. We DENY the appellant's petition because it does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#). For the reasons explained below, however, we REOPEN this appeal on our own motion under [5 C.F.R. § 1201.118](#) and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING her August 2, 2009 IRA appeal as untimely. We have also considered the

appellant's current appeal as a petition for review of an October 6, 2005 initial decision dismissing for lack of jurisdiction a prior IRA appeal the appellant filed in 2005. For the reasons explained below, we DENY her petition for review of the October 6, 2005 initial decision.

### BACKGROUND

¶2 Effective December 19, 2003, the appellant resigned from her position as a Registered Nurse. Initial Appeal File (IAF), Tab 1 at 1, 10. She filed an appeal with the Board alleging that her resignation was involuntary. The administrative judge dismissed that appeal finding that the appellant was not an employee with Board appeal rights under chapter 75, and the Board denied her petition for review of that decision.<sup>1</sup> *Pacilli v. Department of Veterans Affairs*, MSPB Docket No. SF-0752-04-0123-I-1 (*Pacilli I*), Initial Decision (Jan. 22, 2004); *Pacilli v. Department of Veterans Affairs*, [98 M.S.P.R. 190](#) (2005) (Table).

¶3 In its February 10, 2005 Final Order denying the petition for review, the Board noted that the appellant had submitted a complaint filed with the Office of Special Counsel (OSC) on October 8, 2003, raising allegations of whistleblower reprisal, and the Board forwarded the complaint to the regional office for adjudication as a new IRA appeal. *Pacilli v. Department of Veterans Affairs*, MSPB Docket No. SF-1221-05-0393-W-1 (*Pacilli II*). The administrative judge dismissed *Pacilli II* without prejudice, pending completion of the OSC investigation. *Pacilli II*, Initial Decision (Feb. 24, 2005). The appellant later refiled her IRA appeal, which the administrative judge characterized as alleging that the agency threatened to terminate her in retaliation for a certain protected

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<sup>1</sup> We have taken notice of certain documents and actions referenced in the appellant's prior Board appeals, which are not part of the record in the instant appeal. The Board may take official notice of matters that can be verified, including documents or actions in other Board appeals. *Moore v. Department of Justice*, [112 M.S.P.R. 382](#), ¶ 20 & n.6 (2009); *Woodjones v. Department of the Army*, [89 M.S.P.R. 196](#), ¶ 15 (2001); [5 C.F.R. § 1201.64](#).

disclosure. *Pacilli v. Department of Veterans Affairs*, MSPB Docket No. SF-1221-05-0393-W-2 (*Pacilli III*), Acknowledgment Order (July 11, 2005). On October 6, 2005, the administrative judge dismissed *Pacilli III* for lack of jurisdiction based on his finding that the appellant's nonspecific claims before OSC were insufficient to exhaust any whistleblower reprisal claim related to a threat to terminate her employment, and the administrative judge's decision became final in November 2005 after neither party filed a petition for review.<sup>2</sup> *Pacilli III*, Initial Decision (Oct. 6, 2005); IAF, Tab 5 at 4-9; see [5 C.F.R. § 1201.113](#).

¶4 The appellant filed the instant appeal on August 2, 2009, nearly 4 years later, asking the Board to consider whistleblower reprisal allegations that she claims to have raised in her 2003 OSC complaint. IAF, Tab 1 at 1, 3-10, Tab 2, Tab 6 at 2-3, Tab 10 at 3. The administrative judge issued an acknowledgment order explaining that it appeared that she had filed her appeal late and ordering her to file evidence and argument showing that: (1) the appeal was timely; (2) her employing agency engaged in affirmative conduct that affected the timeliness of her appeal; or (3) OSC failed to notify her that it had terminated its investigation of her complaint. IAF, Tab 3 at 3. In the order, the administrative judge also explained the jurisdictional issues in an IRA appeal and the appellant's burden of proof. *Id.* at 10-15. In response, the appellant requested "an exception to time limits and jurisdiction" because the attorney who represented her in *Pacilli III* was disbarred in 2008 for mishandling his clients' funds. IAF, Tab 6 at 2-5. The agency responded by asking the Board to dismiss the appeal,

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<sup>2</sup> On August 25, 2005, while *Pacilli III* was pending, the appellant's attorney filed a lawsuit against the agency in the U.S. District Court for the Eastern District of California alleging, among other things, that the appellant was subjected to unlawful reprisal for whistleblowing activity. The court dismissed the complaint for lack of subject matter jurisdiction. *Pacilli v. Department of Veterans Affairs*, No. CV-F-05-1095 OWW SMS, 2006 WL 2166574, at \*1, \*3-4, \*6 (E.D. Cal. July 31, 2006); IAF, Tab 5 at 10, 12, 14.

contending in part that, “[r]ather than treating this filing as a ‘new’ appeal, this matter should be more properly characterized as a request to reopen [*Pacilli III*].” IAF, Tab 9 at 4.

¶5 On September 21, 2009, the administrative judge issued an initial decision dismissing the appellant’s IRA appeal as untimely filed. IAF, Tab 11, Initial Decision (ID) at 1, 4. The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. The agency responded in opposition to her petition, and the appellant replied thereto.<sup>3</sup> PFR File, Tabs 3-4, 7.

### ANALYSIS

¶6 The Board may grant a petition for review when an administrative judge made an error interpreting a law or regulation, or when there is new and material evidence that was not previously available despite due diligence. [5 C.F.R. § 1201.115](#)(d). The appellant has not made any argument establishing error by the administrative judge, or presented any new and material evidence affecting the outcome of this case. For the reasons explained below, the alleged new evidence she submits regarding her former attorney is immaterial to the result in this appeal. We therefore deny the appellant’s petition because it does not meet the criteria for review.

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<sup>3</sup> Although the appellant filed her replies after the close of the record on review, PFR File, Tab 2 at 1, we have considered them because her replies are based on evidence that was not readily available before the record closed, *see* [5 C.F.R. § 1201.114](#)(i) (“Once the record [on review] closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.”). Specifically, she declared under the penalty of perjury that, after the record closed, the Fresno County District Attorney’s Office informed her that her former attorney is the subject of a criminal investigation for additional misconduct. PFR File, Tab 4 at 3. She also submitted a January 24, 2010 newspaper article that mentions her former attorney’s disbarment and reports him as stating that he had personal problems, including problems with alcohol and depression, which may have contributed to the misconduct leading to his disbarment. PFR File, Tab 7.

¶7 We reopen this appeal on our own motion under [5 C.F.R. § 1201.118](#), however, because the disposition of this appeal on timeliness grounds is not entirely appropriate when the appellant is, at least in part, raising matters that were the subject of a prior timely IRA appeal. The appellant filed this appeal concerning various allegations of whistleblower reprisal that she claims she raised in her 2003 complaint to OSC. IAF, Tab 1, Tab 2, Tab 6 at 2-3. Her submissions below indicated that she was seeking corrective action regarding alleged acts of reprisal including, but not limited to, the alleged threatened termination that was the subject of the administrative judge's decision in *Pacilli III*. IAF, Tab 1 at 10-11, Tab 2, Tab 5 at 4-7, Tab 8 at 3, Tab 10 at 3. Thus, we find it appropriate to consider her current appeal as a petition for review in *Pacilli III*, as well as a new IRA appeal concerning alleged acts of reprisal that were not addressed in the *Pacilli III* decision.

To the extent that the appellant was attempting to file a new IRA appeal, we affirm the administrative judge's finding that the appeal was untimely filed.

¶8 The appellant bears the burden of proving by preponderant evidence that she timely filed her appeal. See *Walsh v. Social Security Administration*, [93 M.S.P.R. 617](#), ¶ 5 (2003); [5 C.F.R. § 1201.56\(a\)\(2\)\(ii\)](#). The Whistleblower Protection Act provides that an IRA appeal may be filed with the Board if “no more than 60 days have elapsed since notification was provided to [the] employee, former employee, or applicant for employment that [OSC's] investigation was terminated.” [5 U.S.C. § 1214\(a\)\(3\)\(A\)\(ii\)](#); *MacDonald v. Department of Justice*, [105 M.S.P.R. 83](#), ¶ 11 (2007). Similarly, the Board's regulations provide that an IRA appeal must be filed no later than 65 days after the issuance of OSC's written notification that the investigation was terminated or, if the appellant shows that OSC's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the notification. [5 C.F.R. § 1209.5\(a\)\(1\)](#); *MacDonald*, [105 M.S.P.R. 83](#), ¶ 11. The time limit for filing an IRA appeal is triggered by notice from the OSC that it

terminated its investigation. *See Walsh*, [93 M.S.P.R. 617](#), ¶¶ 5-7; *Bauer v. Department of the Army*, [88 M.S.P.R. 352](#), ¶ 7 (2001).

¶9 It is undisputed that on June 21, 2005, OSC issued a letter notifying the appellant that it had terminated its investigation into her whistleblower complaint. IAF, Tab 6 at 3. The appellant has not alleged that she did not receive the June 21, 2005 termination letter within 5 days of its issuance, and thus, the appellant had 65 days after the OSC's issuance of its termination letter, or by August 25, 2005, to file her IRA appeal. It is further undisputed that the appellant filed this IRA appeal on August 2, 2009. IAF, Tab 1. Thus, the appellant's 2009 IRA appeal was untimely filed by almost 4 years.

¶10 The appellant has argued that the Board should waive the time limit for filing her IRA appeal because the attorney who represented her in these matters in 2005 reportedly had problems with alcohol and depression, was disbarred in 2008, and is under criminal investigation. IAF, Tab 6 at 2, Tab 8 at 3; PFR File, Tab 1 at 3-4, Tab 4 at 3, Tab 7. She has not, however, made any specific claim that her former attorney thwarted her diligent efforts to prosecute a timely Board appeal. She has also argued that the Board should waive the filing deadline because, before OSC issued its June 21, 2005 closure letter, OSC allegedly "instructed" her not to appeal to the Board and led her to believe that it would "rule" favorably on her complaint. IAF, Tab 6 at 2, Tab 8 at 3. The administrative judge dismissed the instant appeal based on his findings that the appellant made no showing of good cause for the 4-year delay in filing her IRA appeal, and there was no showing that OSC "discourage[d] or hinder[ed] her from filing a timely Board appeal" after she received the OSC closure letter and notice of her Board appeal rights. ID at 4. Although we agree with the administrative judge's finding that the appeal was untimely, we note that the Board has no authority to waive the statutory time limit for filing an IRA appeal for good cause shown. *See MacDonald*, [105 M.S.P.R. 83](#), ¶ 11; *Coufal v. Department of Justice*, [98 M.S.P.R. 31](#), ¶ 31 (2004). Thus, the Board cannot waive the time limit for

filing her IRA appeal based on her claims regarding the conduct of her former attorney and OSC.

¶11 Additionally, although the Board's decision in *Wood v. Department of the Air Force*, [54 M.S.P.R. 587](#), 592-93 (1992), noted that the Supreme Court has held that there may be some circumstances that justify the application of the doctrine of equitable tolling to a statutory deadline, those circumstances are limited, such as where a complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Bauer*, [88 M.S.P.R. 352](#), ¶ 9; *see Irwin v. Department of Veterans Affairs*, [498 U.S. 89](#), 95-96 (1990). Here, as in *Wood*, the appellant has alleged no facts that would bring her within this doctrine and excuse her 4-year delay in filing her appeal. *See Wood*, 54 M.S.P.R. at 593.

The appellant's petition for review of the October 6, 2005 initial decision in *Pacilli III* fails to meet the Board's criteria for review.

¶12 The appellant's submissions show that the appellant not only seeks to file a new IRA appeal but also wants the Board to reopen or reinstate her prior IRA appeal, *Pacilli III*, because of her concerns about the attorney who had represented her in that matter. IAF, Tab 5 at 3-9, Tab 6 at 2, Tab 8 at 3, Tab 10 at 3; PFR File, Tab 1, Tab 4 at 3, Tab 7. We have, therefore, considered her submissions as a petition for review of the October 6, 2005 initial decision in *Pacilli III*. *See Setevage v. Department of Defense*, [77 M.S.P.R. 120](#), 124 (1997) ("When a party files a request to reopen in a case in which, as here, no party has filed a petition for review, the Board processes the filing as a petition for review . . ."). Although a substantial question exists regarding the timeliness of the appellant's petition for review of the October 6, 2005 initial decision, we have not decided that issue because the petition for review does not satisfy the criteria for review for the reasons set forth below. *See* [5 C.F.R. § 1201.115](#)(d).

¶13 The appellant has presented new evidence showing that her former attorney was disbarred in 2008 for mishandling his clients' funds, that he reportedly had

problems with alcohol and depression, and that he is under criminal investigation. PFR File, Tab 1 at 4-6, Tab 4 at 3, Tab 7 at 4; IAF, Tab 6 at 2, 4-5, Tab 8 at 3, Tab 10 at 3. The appellant has not shown a link between her former attorney's disbarment, his personal problems, the criminal investigation, and the outcome of *Pacilli III*. Her vague claim that she recently realized that she received "inappropriate [c]ounsel and was misled during [her] time as his client" does not suggest that there is any error in the October 6, 2005 initial decision. IAF, Tab 6 at 2. An appellant is generally responsible for the errors of her chosen representative. *See, e.g., Johnson v. Department of the Treasury*, [721 F.2d 361](#), 365 (Fed. Cir. 1983); *De Luna v. Department of the Navy*, [58 M.S.P.R. 526](#), 530-31 (1993). An exception may lie when an appellant establishes that her diligent efforts to prosecute an appeal were thwarted, without her knowledge, by her attorney's deceptions, negligence, or malfeasance. *See Edwards v. Department of Veterans Affairs*, [111 M.S.P.R. 297](#), ¶ 6 (2009); *Helmstetter v. Department of Homeland Security*, [106 M.S.P.R. 101](#), ¶ 11 (2007); *Green v. Department of the Air Force*, [83 M.S.P.R. 333](#), ¶ 5 (1999), *aff'd*, 232 F.3d 912 (Fed. Cir. 2000) (Table). There is no such evidence here, and her new evidence is immaterial to the outcome of *Pacilli III*.

¶14 Her submissions also fail to make any specific allegation of error in the October 6, 2005 initial decision. *See Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 92-93 (1992) (a petition for review that contained neither evidence nor argument demonstrating error by the administrative judge did not meet the Board's criteria for review); [5 C.F.R. § 1201.115](#)(a) ("The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.").

¶15 Accordingly, we find that the appellant's petition for review of the October 6, 2005 initial decision fails to meet the Board's criteria for review. *See* [5 C.F.R. § 1201.115](#)(d).



ORDER

¶16 This is the final decision of the Merit Systems Protection Board in the appeal docketed as SF-1221-09-0862-W-1. [5 C.F.R. § 1201.113\(c\)](#). This is also the Board's final order denying the appellant's petition for review in *Pacilli III*, MSPB Docket No. SF-1221-05-0393-W-2. The October 6, 2005 initial decision in *Pacilli III* is final. 5 C.F.R. § 1201.113(b).

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.