

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

2010 MSPB 83

Docket No. DE-0752-09-0481-I-1

**Delisa M. Terrell,
Appellant,
v.
United States Postal Service,
Agency.**

May 6, 2010

John J. Zodrow, Esquire, Denver, Colorado, for the appellant.

Judith L. Homich, Esquire, Denver, Colorado, 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 (PFR) of the initial decision (ID) dismissing her removal appeal as untimely filed without a showing of good cause for the filing delay. For the reasons set forth below, we DISMISS the petition for review as untimely filed by 42 days without a showing of good cause for the filing delay.

BACKGROUND

¶2 On September 12, 2008, the agency removed the appellant from her Customer Service Manager position for unacceptable conduct. Initial Appeal File

(IAF), Tab 4 at 5-11. To challenge the removal action, the appellant filed an equal employment opportunity (EEO) complaint alleging discrimination based on race, color and disability, and retaliation for her prior EEO activity. *Id.* at 12. On July 21, 2009, the agency issued a final decision finding no discrimination. *Id.* at 33-34.

¶3 On August 26, 2009, the appellant filed a removal appeal with the Board. IAF, Tab 1 at 3. Both she and her designated representative registered as electronic filers (e-filers). IAF, Tab 1 at 2, 5, Tab 4 at 2, Tab 5. The agency moved to dismiss the appeal as untimely filed, IAF, Tab 6, and the parties filed responses and replies, IAF, Tabs 9-11. On November 4, 2009, the administrative judge issued an initial decision dismissing the appeal as untimely filed by 2 days without a showing of good cause for the filing delay. ID at 1-6. The initial decision apprised the appellant that the decision would become final on December 9, 2009, unless she filed a petition for review by that date. ID at 6.

¶4 On January 18, 2010, 40 days after the initial decision became final, the appellant's representative requested an extension of time to file a petition for review. PFR File, Tab 1 at 4-5. The following day, the Clerk of the Board denied the request as untimely filed pursuant to [5 C.F.R. § 1201.114\(e\)](#), and directed the appellant to [5 C.F.R. § 1201.114\(f\)](#) concerning late filings. PFR File, Tab 2. On January 20, 2010, the appellant's representative filed a petition for review accompanied by a motion to waive the filing deadline for good cause shown. PFR File, Tab 3 at 4-38. In the motion, the appellant alleges that the "timeline to file her Petition for Review should run 30 days from [December 21, 2009] (making it due January 20, 2009 [sic])" because neither she nor her representative received a copy of the initial decision until December 21, 2009,

and she attaches affidavits in support.¹ *Id.* at 21-23, 26, 37-38. The agency has responded in opposition to the petition for review. PFR File, Tab 6.

ANALYSIS

¶5 A petition for review must be filed within 35 days after the issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. [5 C.F.R. § 1201.114](#)(d). The Board will waive this time limit only upon a showing of good cause for the filing delay. [5 C.F.R. § 1201.114](#)(f). The appellant bears the burden of proof with regard to timeliness. *Smith v. Department of the Army*, [105 M.S.P.R. 433](#), ¶ 4 (2007).

¶6 The Board may grant or deny the waiver of a time limit for filing a petition for review, in the interest of justice, after considering all the facts and circumstances of a particular case. *Smith*, [105 M.S.P.R. 433](#), ¶ 5. To establish good cause for an untimely filing, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Id.*; *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 her excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to her inability to timely file her petition. *Smith*, [105 M.S.P.R. 433](#), ¶ 5; *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).

¹ The appellant's attorney claimed that he first learned of the initial decision on December 21, 2009, when his staff telephoned the Denver Field Office to inquire about the status of the agency's September 17, 2009 motion to dismiss. PFR File, Tab 1 at 4.

¶7 Here, the November 4, 2009 initial decision clearly apprised the appellant of the December 9, 2009 deadline to file a petition for review. ID at 1, 9. However, her representative did not file a petition for review until January 20, 2010, 42 days after the initial decision became final. *See* PFR File, Tab 3. The appellant contends that neither she nor her representative received a copy of the initial decision until December 21, 2009, and therefore the deadline for filing a petition for review fell on January 20, 2010, 30 days from the date she received the decision.² *See* PFR File, Tab 3 at 21-23.

¶8 We reject the appellant's contention that she and her representative did not receive the initial decision until December 21, 2009. Both registered as e-filers, and thereby consented to accept all pleadings filed by other registered e-filers, and all documents issued by the Board in electronic form. IAF, Tab 1 at 2, Tab 5; *see* [5 C.F.R. § 1201.14](#)(e) and (j)(1). The Board's e-Appeal Online Document

² Citing the fact that the certificate of service for the initial decision includes the postal address for each party, the appellant questions whether the Board possessed the correct e-mail addresses. PFR File, Tab 3 at 21-22. The inclusion of postal addresses in lieu of e-mail addresses on the certificate of service reflects a policy of protecting individual privacy so that e-filers "will not be required to disclose their e-mail addresses to anyone except the MSPB." Merit Systems Protection Board, Interim Regulatory Changes for Implementation of Electronic Filing, 69 Fed. Reg. 57627 (Sept. 27, 2004). Further, the appellant's assertion that the Board may not possess the parties' correct e-mail addresses is unsupported. The paralegal for the appellant's representative executed an affidavit averring that she confirmed with the Board's Denver Field Office that her e-mail address "is the e-mail address they have on record for John Zodrow." PFR File, Tab 1 at 18. There is no reason to believe that the Board sent the initial decision to incorrect e-mail addresses where it appears that the appellant received all of the other electronic filings (i.e., she submitted filings pursuant to the Board's orders and responded to the agency's motion to dismiss), and she has not alleged otherwise. *See* PFR, Tab 3; IAF, Tabs 2-3, 6-11.

The appellant also argues that she expected the Board to send a copy of the initial decision to her physical address because the Board listed physical addresses on the certificate of service. *See* PFR File, Tab 3 at 22. Such an expectation would not have been reasonable, as the Board's e-filing regulation provides that paper copies of MSPB documents issued to the parties "will not ordinarily be served on e-filers." [5 C.F.R. § 1201.14](#)(j)(1).

Distribution Log indicates that on November 4, 2009, notice of the initial decision was sent to the appellant's and her representative's e-mail addresses of record. Moreover, under [5 C.F.R. § 1201.14\(m\)\(2\)](#), "MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission." When a law or regulation "deems" something to have been done, the event is considered to have occurred whether or not it actually did. *Rivera v. Social Security Administration*, [111 M.S.P.R. 581](#), ¶ 5 (2009). We therefore deem the appellant to have electronically received the initial decision on November 4, 2009, and find that she filed her petition for review 42 days late.

¶9 The sole argument in the appellant's motion to waive the time limit for filing a petition for review is that neither she nor her representative received the initial decision until December 21, 2009. PFR File, Tab 3 at 21-23. As set forth above, we find this argument to be without merit. The appellant presents no further explanation for the filing delay, and no evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits. *See Moorman*, 68 M.S.P.R. at 63. A 42-day delay is significant, and the appellant is represented. *See Laboy v. U.S. Postal Service*, [103 M.S.P.R. 570](#), ¶ 9 (2006) (a 30-day-filing delay is not minimal); *Moorman*, 68 M.S.P.R. at 62-63; IAF, Tab 5; PFR File, Tabs 1, 3.

¶10 Further, the appellant has not shown that she exercised due diligence. *See Smith*, [105 M.S.P.R. 433](#), ¶ 5; *Alonzo*, 4 M.S.P.R. at 184. The appellant's representative first inquired about the status of the appeal on December 21, 2009, over 2 months after the parties finished briefing the agency's motion to dismiss. *See* PFR File, Tab 1 at 22; IAF, Tab 11 at 1. Consequently, neither the appellant nor her representative fulfilled their obligation under [5 C.F.R. § 1201.14\(j\)\(3\)](#) to monitor the case activity at the Repository at e-Appeal Online. *See Rivera*, [111 M.S.P.R. 581](#), ¶ 5. Even after the Denver Field Office faxed the appellant's representative a copy of the initial decision on December 21, 2009, the appellant filed nothing over the next 27 days. *See* ID at 12; PFR File, Tab 1, Tab 3 at 26.

Not until after the Clerk of the Board denied the appellant's January 18, 2010 request for an extension of time to file her petition for review did the appellant file her petition for review and accompanying motion to waive the time limit for good cause shown. *See* PFR File, Tab 2 at 2, Tab 3 at 23. For the foregoing reasons, we find that the appellant failed to show that she exercised due diligence or ordinary prudence in this case that would justify waiving the filing deadline. *See Smith*, [105 M.S.P.R. 433](#), ¶ 5; *Alonzo*, 4 M.S.P.R. at 184. We therefore DISMISS the appeal as untimely filed by 42 days without a showing of good cause for the filing delay.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board 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.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.