

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

2010 MSPB 95

Docket No. SF-0831-09-0810-I-1

**Manuel V. Custodio,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

May 25, 2010

Rodelio V. Mendoza, Naga City, Philippines, for the appellant.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his appeal of the August 10, 2007 final decision by the Office of Personnel Management (OPM) as untimely filed without a showing of good cause for the delay. For the reasons set forth below, we GRANT the petition, REVERSE the initial decision, and REMAND the appeal for adjudication on the merits.

BACKGROUND

¶2 The appellant served as a Janitor with the Department of the Navy from April 18, 1974, until his resignation on April 20, 1979. Initial Appeal File (IAF), Tab 5, Subtab 4 at 12-13. On the date of his resignation, the appellant applied for a refund of his Civil Service Retirement System (CSRS) retirement contributions, and OPM claimed that on June 1, 1979, it authorized the refund. *Id.*, Subtabs 2, 3. Some decades later, the appellant applied to OPM for retirement benefits, completing an “Application for Deferred or Postponed Retirement” on February 25, 2007, and an “Application for Immediate Retirement” on August 9, 2007. *Id.*, Subtab 4 at 1-3, 6-8. By letter dated August 10, 2007, OPM notified the appellant that, because he had received a refund of his retirement contributions, he was not eligible to receive annuity benefits under CSRS. *Id.*, Subtab 2. OPM further informed the appellant that he could not redeposit his refunded contributions, as he was not currently employed by the Federal government. *Id.* The letter indicated that it was OPM’s “final decision,” and that the appellant had the right to appeal to the Board within 30 calendar days of the date of the decision, or 30 days after receipt of the decision, whichever was later. *Id.*

¶3 By e-mail dated August 30, 2007, the appellant requested reconsideration of OPM’s August 10, 2007 decision. IAF, Tab 6, Ex. A. On the same day, OPM responded that his reconsideration request was being sent to another group in OPM for a response. Petition for Review (PFR) File, Tab 1 at 29. On September 17, 2007, OPM advised the appellant via e-mail that it had already sent him an “initial final decision” informing him of his Board appeal rights. PFR File, Tab 1 at 31. However, the appellant “decline[d]” to file with the Board and continued to seek reconsideration, insisting that the decision OPM sent him on August 10, 2007, was an initial decision, not a final one. *Id.* at 34-36. On October 12, 2007, OPM informed the appellant that the “Reconsideration Branch in Washington will be notifying you once they have reviewed your case file and have made a determination on your request for reconsideration. This can take up to 8 months

for them to make this decision.” *Id.* at 37. The correspondence between the appellant and OPM continued, and OPM eventually informed the appellant that his records were forwarded to Washington on January 22, 2008, and that it could not give him a time frame for its decision. *Id.* at 41. On February 9, 2008, OPM informed the appellant that his case was sent to the Reconsideration Office in Washington, that the office would respond to him, and that the review process could take up to 3 months. *Id.* at 58. On March 19, 2008, OPM informed the appellant that it determined it gave him a decision with appeal rights in August 2007, but it believed the appellant had not yet received it. *Id.* at 62. The appellant responded that he had received the August 2007 decision, but that he subsequently requested reconsideration. *Id.* at 64. The appellant continued to correspond with OPM, and on August 12, 2008, OPM again indicated that his case was still in its Washington office for review. *Id.* at 73. It does not appear that OPM ever rendered a reconsideration decision.

¶4 On July 21, 2009, the appellant filed an appeal of OPM’s August 10, 2007 decision. IAF, Tab 1. In her Acknowledgment Order, the administrative judge informed the appellant that his appeal appeared to be untimely, explained his burden of proof on timeliness, and directed him to file evidence and argument on the issue. IAF, Tab 2. In his response to the order, the appellant indicated that he had requested reconsideration of OPM’s decision, and that OPM had failed to respond to his request. IAF, Tab 3. In a subsequent submission, the appellant reiterated that he had moved for reconsideration, and added that OPM Benefits Specialists had sent e-mails assuring him that his motion was being reviewed and that a final decision was forthcoming. IAF, Tab 6. He submitted a copy of his motion for reconsideration,¹ but provided no evidence that OPM had responded.

¹ Contrary to the finding of the administrative judge, the motion for reconsideration includes an e-mail header indicating that the appellant sent the motion to OPM on August 30, 2007. IAF, Tab 6, Ex. A.

Id., Ex. A. The administrative judge dismissed the appeal, finding that the August 10, 2007 decision was OPM's final decision, and that the appellant had failed to show good cause for the nearly 2-year delay in filing his Board appeal. IAF, Tab 7 (Initial Decision, Nov. 4, 2009).

¶5 On petition for review, the appellant reiterates his claim that OPM promised to issue a reconsideration decision but failed to do so. PFR File, Tab 1 at 1-2. In support of his claim, he submits for the first time copies of the aforementioned e-mail correspondence with OPM concerning his August 30, 2007 request for reconsideration. *Id.* at 28-92. OPM has filed a response in opposition to the appellant's petition. PFR File, Tab 4.

ANALYSIS

¶6 The appellant has the burden of proving the timeliness of his appeal by a preponderance of the evidence. [5 C.F.R. § 1201.56\(a\)\(2\)\(ii\)](#). With exceptions not applicable here, the deadline for filing an appeal is 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. [5 C.F.R. § 1201.22\(b\)\(1\)](#). OPM's final decision is dated August 10, 2007, and the appellant has not alleged any unusual delay in his receipt of the decision. We therefore find that his July 21, 2009 Board appeal was untimely filed by approximately 22 months.

¶7 The Board will dismiss an untimely filed appeal unless the appellant shows good cause for the delay in filing. [5 C.F.R. § 1201.22\(c\)](#). To establish good cause for the untimely filing of an appeal, 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).

¶8 Generally, an appellant's failure to follow explicit filing instructions does not constitute good cause for an ensuing delay. *Tress v. Office of Personnel Management*, [109 M.S.P.R. 126](#), ¶ 5 (2008); *White v. Department of the Navy*, [55 M.S.P.R. 376](#), 379 (1992). However, the Board has recognized an exception to this rule where, as here, an appellant mistakenly files a request for review of OPM's final decision with OPM instead of the Board, and does so within the time period for filing a Board appeal. In such cases, the Board has found good cause for the untimely filing when the following conditions are met: (1) the ensuing delay was caused not only by the appellant's failure to follow the instructions in OPM's final decision, but also in part by OPM's failure to redirect the otherwise timely appeal to the Board; (2) the appellant clearly intended to seek further review of the final decision; (3) the appellant was proceeding pro se; and (4) there is no evidence that granting a waiver of the filing deadline would be prejudicial to OPM. *See, e.g., Tress*, [109 M.S.P.R. 126](#), ¶ 9; *DeAstrero v. Office of Personnel Management*, [39 M.S.P.R. 431](#), 433-34 (1989), *aff'd*, 907 F.2d 157 (Fed. Cir. 1990) (Table).

¶9 Here all four elements are satisfied. The record reflects that the appellant filed his request for reconsideration of OPM's August 10, 2007 final decision on August 30, 2007, within the time period for filing a Board appeal, and thus, he would have met the filing deadline had OPM promptly redirected his request to the Board. Furthermore, the appellant clearly intended to seek further review of OPM's August 10, 2007 decision, he was proceeding pro se at the time he requested reconsideration, and there is no evidence that OPM would be prejudiced if the Board were to grant a waiver of the filing deadline.

Accordingly, we find that the appellant has shown good cause for the delay in filing his appeal.²

ORDER

¶10 We REVERSE the initial decision and REMAND the appeal to the Western Regional Office for adjudication on the merits.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

² We note that the facts of this case bear some resemblance to those of *Maniago v. Office of Personnel Management*, [45 M.S.P.R. 553](#) (1990). Like the appellant, Mr. Maniago persisted in pursuing reconsideration of a final decision even after OPM advised him of his error and notified him that his appeal rights lay with the Board. *Id.* at 557-58. The Board found that, even though the filing delay was caused in part by OPM's failure to forward his request to the Board, Mr. Maniago failed to show good cause because he did not merely fail to follow OPM's instructions, but "specifically rejected" those instructions. *Id.* at 558. In this case, however, OPM gave the appellant mixed messages, first correctly informing him that his appeal rights lay with the Board, but later making statements which led him to believe that it would review his request for reconsideration. Thus, although the appellant did at one point consciously "decline" to file with the Board, *see* PFR File, Tab 1 at 35, we find that, once he was told that OPM would review his request, OPM was at fault for any further delay.