

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

2010 MSPB 100

Docket No. NY-831E-10-0017-I-1

**Robert Pace,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

June 2, 2010

Delores Pace, Brooklyn, New York, and Robert F. Hermann, Esquire,
Westfield, New Jersey, for the appellant.

Camela Green-Brown, 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 agency has filed a petition for review of the initial decision that reversed its final decision¹ denying the appellant's disability retirement

¹ The administrative judge determined that the agency's September 5, 2008 initial decision constituted a final decision on the appellant's disability retirement application, and, thus, that the Board has jurisdiction over this appeal, because she dismissed the appellant's previous appeal based on the agency's assurances that it would render a final reconsideration decision by October 12, 2009, "which it subsequently refused and failed to do." Initial Decision at 5. Under these circumstances, we agree with the administrative judge that the Board has jurisdiction over this appeal. *See, e.g., Johnson*

application. For the following reasons, we DISMISS the petition for review as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 The administrative judge issued the initial decision on February 12, 2010. Initial Decision (ID) at 1. The initial decision stated that it would become final on March 19, 2010, unless a petition for review was filed by that date or the Board reopened the case on its own motion. *Id.* at 18. The agency filed its petition for review of the initial decision on March 25, 2010. Petition For Review (PFR) File, Tab 1 at 1. The appellant filed a response opposing the petition for review. PFR File, Tab 3.

ANALYSIS

The agency has failed to prove that it timely filed its petition for review.

¶3 The Board's regulation governing the time for filing a petition for review states, in relevant part, as follows:

Any petition for review must be filed within 35 days after the date of 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\(d\)](#).

¶4 The agency apparently asserts that its petition for review is timely by stating that “[a]lthough the Initial Decision is dated February 12, 2010, [the agency’s] representative did not receive the initial decision until March 5, 2010.” PFR at 3. Thus, it apparently argues that it received the initial decision more than 5 days after it was issued and that it filed its petition for review within 30 days after receipt.

v. Office of Personnel Management, [113 M.S.P.R. 118](#), ¶ 10 (2010); *Settlers v. Office of Personnel Management*, [108 M.S.P.R. 105](#), ¶ 9 (2008); *Sims v. Office of Personnel Management*, [94 M.S.P.R. 102](#), ¶ 10 (2003).

¶5 The agency has failed to prove that it timely filed its petition for review. The initial decision's certificate of service reflects that it was mailed to the agency's address of record on February 12, 2010. Initial Appeal File, Tabs 2, 5, 13. Board precedent and regulations recognize that documents placed in the mail are presumed to be received in 5 days. *See, e.g., Cabarloc v. Department of Veterans Affairs*, [110 M.S.P.R. 695](#), ¶ 7 (2009); *Williamson v. U.S. Postal Service*, [106 M.S.P.R. 502](#), ¶ 7 (2007); [5 C.F.R. § 1201.4\(1\)](#). The agency has submitted no evidence, such as a sworn statement or a postmarked envelope, showing that the agency did not timely receive the initial decision. Similarly, the agency's representative has presented nothing, such as a sworn statement or affidavit, to support her assertion that she did not receive the initial decision until March 5, 2010. Accordingly, the agency has not shown that its petition for review should be considered timely on the basis that its receipt of the initial decision was delayed. Therefore, we find that the agency's petition for review was 6 days late.

The agency has failed to provide a basis for waiving the filing deadline for its untimely petition for review.

¶6 The Board's regulation governing late filing of a petition for review states, in relevant part, as follows:

Any petition for review . . . that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (e) of this section,² or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under [28 U.S.C. 1746](#). (*See* appendix IV to part 1201.) The affidavit or sworn statement must include:

- (1) The reasons for failing to request an extension before the deadline for the submission; and

² Paragraph (e) provides that a party may file a motion for an extension of time to file a petition for review before the date on which the petition for review is due. [5 C.F.R. § 1201.114\(e\)](#).

- (2) A specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence.

[5 C.F.R. § 1201.114\(f\)](#). The regulation further states as follows:

In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

Id.

¶7 The agency asks the Board to waive the time limit for filing a petition for review. It contends that its representative underwent a fistula angioplasty of the upper right forearm on March 18, 2010, because of symptoms related to her end stage renal failure, and that use of her forearm was restricted until the stitches were removed on March 24, 2010. It states that documentation “could be provided” to show that its representative “requested and used several hours of sick leave due to her medical condition.” PFR at 3.

¶8 In acknowledging the petition for review, the Clerk of the Board informed the agency that the Board’s regulations require that an untimely petition for review must be accompanied by a motion for waiver of the time limit and must include an affidavit or a statement, signed under penalty of perjury, stating why there is good cause for the late filing. The Clerk also informed the agency that, unless it provided a motion with an affidavit or signed statement, the Board may issue an order dismissing its petition for review as untimely, which would result in the initial decision becoming the Board’s final decision. PFR File, Tab 2. The record does not indicate that the agency responded to the Clerk’s notice. In his response to the petition for review, the appellant objected to waiving the filing deadline for the petition for review. PFR File, Tab 3, Opposition at 4-8.

¶9 First, we find that the agency has failed to establish good cause for untimely filing its petition for review because it did not file a motion for an extension of time to file the petition for review or respond to the Clerk’s notice to

submit a motion to waive the time limit and an affidavit or sworn statement. Even if the agency's representative did not receive the initial decision until March 5, 2010, the agency had 2 weeks, i.e., until the initial decision became final on March 19, 2010, to file a motion for an extension of time. The agency has not explained why it did not file such a motion or how its representative's medical condition or her medical procedure on March 18, 2010, prevented it from filing such a motion. Further, as previously noted, the agency did not respond to the Clerk's notice to submit a motion to waive the time limit and an accompanying affidavit or sworn statement. These are sufficient reasons to find that the agency failed to show good cause for its untimely filing. *See, e.g., Jackson v. Office of Personnel Management*, 2010 MSPB 79, ¶ 11; *Morton v. Department of Veterans Affairs*, [113 M.S.P.R. 365](#), ¶ 9 (2010); *Treacy v. Office of Personnel Management*, [113 M.S.P.R. 46](#), ¶ 10 (2010).

¶10 Second, even if we consider the agency's unsworn reasons for untimely filing its petition for review, we find that they fail to provide a basis for waiving the filing deadline. The Board will waive the filing time limit only upon a showing of good cause for the delay. [5 C.F.R. § 1201.114\(f\)](#). To establish good cause, a party must show that it exercised due diligence or ordinary prudence under the particular circumstances of the case. *See Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether a party has shown good cause, the Board will consider the length of the delay, the reasonableness of the excuse and the showing of due diligence, whether the party is proceeding pro se, and whether the party has presented evidence of the existence of circumstances beyond its control that affected its ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to its inability to timely file its 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).

¶11 Here, although the agency stated that its representative suffers from a medical condition and had to undergo a medical procedure, it submitted no medical evidence showing the time period involved and explaining how her condition and the procedure prevented it from timely filing a petition for review, or, as previously noted, requesting an extension of time. Thus, the agency has failed to show that its reasons provide good cause for the late filing. *See Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 437 (1998). Further, although the delay in this case is not especially lengthy, it is not minimal. *See Gonzalez v. Department of Veterans Affairs*, [111 M.S.P.R. 697](#), ¶ 11 (2009) (finding that an 8-day delay in filing a petition for review is not minimal). In any event, we have consistently denied a waiver of our filing deadline if a good reason for the delay is not shown, even where the delay is minimal and the petitioning party is pro se. *E.g., Schuringa v. Department of the Treasury*, [106 M.S.P.R. 1](#), ¶¶ 4 n.*, 9, 14 (2007) (declining to excuse a 4-day delay in filing an appeal where the pro se appellant's submissions did not support a finding that she was medically prevented from timely filing her appeal or from requesting an extension of time); *Lockhart v. Office of Personnel Management*, [94 M.S.P.R. 396](#), ¶¶ 7-8 (2003) (declining to excuse a 5-day delay in filing a petition for review where the pro se appellant failed to show good cause for the delay); *Gaddy v. Department of the Army*, [92 M.S.P.R. 315](#), ¶¶ 3, 6-7 (2002) (declining to excuse a pro se appellant's 8-day delay in filing a petition for review where the appellant failed to show good cause for the delay), *review dismissed*, 55 F. App'x 566 (Fed. Cir. 2003). Here, of course, the petitioning party is not pro se, another factor militating against waiving the filing deadline.

¶12 Moreover, the initial decision informed the agency that it would become the Board's final decision on March 19, 2010, unless a petition for review was filed by that date. ID at 18. The Board has declined to find good cause for an untimely filing where, as here, the initial decision clearly notified the party of the time limit within which to file a petition for review, and the party failed to file

within the time limit. *See, e.g., Rothlisberger v. Department of the Army*, 2010 MSPB 57, ¶ 8. Finally, the agency's arguments regarding the merits of the case do not establish good cause for a late filing. *See, e.g., Wright v. Department of the Treasury*, [113 M.S.P.R. 124](#), ¶ 7 (2010).

¶13 Therefore, we find that the agency has failed to show that it exercised the due diligence or ordinary prudence in this case that would justify waiving the filing deadline. Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing.

ORDER

¶14 This is the final decision of the Merit Systems Protection Board regarding the timeliness of the petition for review. The initial decision will remain the final decision of the Board regarding the merits of the appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

¶15 We ORDER the Office of Personnel Management (OPM) to award the appellant disability retirement. OPM must complete this action no later than 20 days after the date of this decision.

¶16 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶17 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the

Board's Order, and should include the dates and results of any communications with OPM. See [5 C.F.R. § 1201.182\(a\)](#).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.