

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

**2010 MSPB 133**

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Docket No. AT-0752-10-0015-I-1

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**Gary L. Jacks,  
Appellant,**

**v.**

**Department of the Air Force,  
Agency.**

July 13, 2010

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Gary L. Jacks, Panama City, Florida, pro se.

Captain James M. Reed, Eglin Air Force Base, Florida, 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 January 4, 2010 initial decision that affirmed his removal. For the reasons set forth below, we DISMISS the petition as untimely filed without a showing of good cause for the delay.

**BACKGROUND**

¶2 The agency proposed the appellant's removal from his Civil Engineer position for unacceptable performance of his assigned duties. Initial Appeal File (IAF), Tab 5 at 12-14. The appellant made oral and written replies. *See id.* at 16-30. The deciding official sustained the charge and found that the appellant's

removal promoted the efficiency of the service. *Id.* at 30. However, the appellant retired just before the September 1, 2009 effective date of his removal, and the agency processed his retirement “ILIA”- in lieu of involuntary action. *Id.* at 30, 105.

¶3 The appellant appealed his removal. IAF, Tab 1. Because the agency had already issued its decision to remove the appellant, the Board retained jurisdiction despite the appellant’s retirement. [5 U.S.C. § 7701\(j\)](#); *Mays v. Department of Transportation*, [27 F.3d 1577](#), 1579-81 (Fed. Cir. 1994). The administrative judge found that the agency established the appellant’s unacceptable performance by preponderant evidence and that his removal promoted the efficiency of the service.<sup>1</sup> IAF, Tab 12, Initial Decision (ID) at 4-16. The initial decision became the final decision of the Board on February 8, 2010. ID at 17; *see* [5 C.F.R. § 1201.113](#).

¶4 On February 19, 2010, the appellant filed a Motion to Extend the Initial Decision Review Date. Petition for Review (PFR) File, Tab 1 at 1-3. The appellant asserted that his receipt of the initial decision was delayed because it had been rerouted to California where he had been residing and was then forwarded back to his home address in Florida after his return. *Id.* Citing [5 C.F.R. § 1201.114\(e\)](#), the Clerk of the Board denied the appellant’s motion to extend the petition for review filing date because the appellant filed his request after the February 8, 2010 due date for his petition for review.<sup>2</sup> PFR File, Tab 2; ID at 17. On February 22, 2010, the appellant filed a petition for review. PFR File, Tab 3. The agency responded that the appellant’s petition for review should

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<sup>1</sup> The administrative judge also found that the appellant failed to prove his affirmative defense of age discrimination. ID at 16-17.

<sup>2</sup> However, the Clerk treated the appellant’s motion to extend the review date as a motion to accept his petition for review as timely. PFR File, Tab 4; *see* [5 C.F.R. § 1201.114\(f\)](#).

be dismissed as untimely filed without good cause for the delay. PFR File, Tab 5 at 6-9.

### ANALYSIS

¶5 A petition for review must be filed within 35 days after the date of issuance of the initial decision, or if the party shows he received the initial decision more than 5 days after it was issued, within 30 days of his receipt. *Williams v. Office of Personnel Management*, [109 M.S.P.R. 237](#), ¶ 7 (2008); [5 C.F.R. § 1201.114](#)(d). Motions for extensions of that time limit must be filed with the Clerk of the Board before the date on which the petition is due. *Nohr v. U.S. Postal Service*, [112 M.S.P.R. 220](#), ¶ 4 (2009); [5 C.F.R. § 1201.114](#)(e). The Board will waive the filing deadline for a petition for review only upon a showing of good cause for the delay in filing. *Lawson v. Department of Homeland Security*, [102 M.S.P.R. 185](#), ¶ 5 (2006); 5 C.F.R. §§ 1201.12, 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 To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Smith*, [105 M.S.P.R. 433](#), ¶ 5; *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). Factors that are considered in the determination of good cause include the length of the delay, the reasonableness of the excuse and showing of due diligence, whether the appellant 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 that similarly shows a causal relationship to his inability to file his petition in a timely manner. *See Wyeroski v. Department of Transportation*, [106 M.S.P.R. 7](#), ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶7 In his motion to extend the deadline for filing his petition for review, the appellant asserted that he resided in California from October 15, 2009, to January

11, 2010, and that his mail was rerouted from his Florida address to his California address during that time. PFR File, Tab 1 at 1. Because his rerouted mail consistently arrived in California 7 to 8 days after its postmark date, he concluded that the initial decision, which the regional office mailed on January 4, 2010, arrived at his California address on January 11, 2010, while he was on his way to the Sacramento Airport. *Id.* He states that his mother mailed him a package containing his rerouted mail, including the initial decision, on January 19, 2010, and that he received it on January 23, 2010. *Id.* at 2. The appellant concedes that due diligence would require that “special attention be given to lookout for this initial decision,” but he counters that he expected to receive the document after his return to Florida, and that he did not alert his mother to be vigilant, but rather merely instructed her to forward his mail. *Id.*

¶8 It is settled law that an appellant is responsible for notifying the Board of any change of address. *See McDonagh v. General Services Administration*, [82 M.S.P.R. 679](#), ¶ 6 (1999), *aff'd*, 232 F.3d 907 (Fed. Cir. 2000) (Table); *West v. Equal Employment Opportunity Commission*, [69 M.S.P.R. 310](#), 313 (1996); *see also* [5 C.F.R. § 1201.26\(b\)\(2\)](#) (the parties must notify the appropriate Board office and each other in writing of any change of address). Further, an appellant is responsible for ensuring the timely forwarding of his own mail and is held responsible for any neglect in this regard. *See McDonagh*, [82 M.S.P.R. 679](#), ¶ 6. The appellant’s failure to fulfill these responsibilities caused a delay in his receipt of the initial decision and indicates a lack of due diligence on his part. *See, e.g., Wrighten v. Department of the Army*, [92 M.S.P.R. 71](#), ¶ 5 (2002) (failure to notify the Board of a change of address is not excusable negligence).

¶9 Moreover, when the appellant allegedly received the initial decision on January 23, 2010, he still had 16 days remaining to file his petition for review, or to request an extension of the time to file it, before the initial decision became the Board’s final decision on February 8, 2010. PFR File, Tab 1 at 2; ID at 17; [5 C.F.R. § 1201.113](#). Yet, he filed his motion to extend the time limit for his

petition for review on February 19, 2010, 11 days late and 27 days after receiving the initial decision, and he offers no excuse for his delay. PFR File, Tab 1. He also fails to offer any excuse why he waited another 3 days to file his petition for review. PFR File, Tab 3.

¶10 The delay in this case is not minimal. *See Gonzalez v. Department of Veterans Affairs*, [111 M.S.P.R. 697](#), ¶ 11 (2009) (an 8-day delay in filing a petition for review is not minimal). The appellant here filed his extension request 11 days after his petition for review was due, and filed his petition for review 14 days late. ID at 17; PFR File, Tabs 1, 3. 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 brief and the appellant 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 pro se appellant's 4-day delay in filing her appeal); *Lockhart v. Office of Personnel Management*, [94 M.S.P.R. 396](#), ¶¶ 7-8 (2003) (declining to excuse a pro se appellant's 5-day delay in filing her petition for review); *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 her petition for review), *review dismissed*, 55 F. App'x 566 (Fed. Cir. 2003).

¶11 We find that by waiting to file his extension request and his petition for review, the appellant failed to show due diligence or ordinary prudence under the circumstances of the case. *See, e.g., Terrell v. U.S. Postal Service*, [114 M.S.P.R. 38](#), ¶¶ 4, 10 (2010) (the appellant failed to show due diligence when she waited until after the petition for review filing deadline had passed and 27 days after she claimed she received the initial decision to file a request for an extension of time to file her petition for review, and then failed to file the petition until after the Board denied her extension of time request); *Alonzo*, 4 M.S.P.R. at 184. Further, the appellant has failed to present 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 that similarly shows a causal relationship to

his inability to file his request or his petition in a timely manner. *See, e.g., Wyeroski, 106 M.S.P.R. 7, ¶ 7.*

¶12 For these reasons, we DISMISS the petition for review as untimely filed with no showing of good cause for the delay. *See 5 C.F.R. § 1201.114(f).*

#### ORDER

¶13 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board with regard to the merits of the 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 further review of this final decision.

#### Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 77960  
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

#### Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your

discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

#### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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](http://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:

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