

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

2010 MSPB 134

Docket No. PH-4324-09-0572-I-1

**Robert Retzler,
Appellant,**

v.

**Department of the Navy,
Agency.**

July 13, 2010

Michael W. Macomber, Esquire, Albany, New York, for the appellant.

Douglas T. Frydenlund, Portsmouth, Virginia, 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 an untimely petition for review of the initial decision issued on November 18, 2009, which denied his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA). For the reasons set forth below, we DISMISS the appellant's petition for review as untimely filed without a showing of good cause for the delay in filing. [5 C.F.R. § 1201.114](#)(d), (f).

BACKGROUND

¶2 On July 22, 2009, the appellant filed an appeal alleging that the agency charged him leave for performance of military duty on non-work days during the period of time from 1987 to 1995 in violation of USERRA. Initial Appeal File (IAF), Tab 1. The administrative judge denied the appellant's request for corrective action, finding that the appellant failed to provide any evidence to support his claim and failed to amend his appeal to provide the necessary information. IAF, Tab 13 at 4. The initial decision informed the parties that it would become final, unless a party filed a petition for review by December 23, 2009, or the Board reopened the case on its own motion. *Id.* at 5.

¶3 The appellant, however, did not file his petition for review until February 25, 2010. Petition for Review (PFR) File, Tab 1. The Office of the Clerk of the Board informed the appellant that his petition was untimely filed, and directed him to submit a sworn statement showing good cause for the untimely filing. PFR File, Tab 2. The appellant's attorney filed a response in which he asserted that: "The Appellant's representative takes full responsibility for the late filing. Due to law firm error in calendaring the Appellant's representative was unaware of the pending deadline and failed to timely submit the Petition." PFR File, Tab 3. The agency's response to the appellant's petition for review requests that the petition be dismissed as untimely filed. PFR File, Tab 5.

ANALYSIS

¶4 A petition for review must generally be filed within 35 days after the date of the issuance of the initial decision, or if the appellant shows that the initial decision was received more than 5 days after the initial decision was issued, within 30 days after the appellant 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 delay in filing. [5 C.F.R. §§ 1201.12](#), 1201.114(f). 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. *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).

¶5 Here, we find that the appellant has failed to show that he exercised due diligence or ordinary prudence in this case that would justify waiving the filing deadline. The appellant filed his petition for review on February 25, 2010, which was two months after the filing deadline on December 23, 2009, and the only explanation is that his attorney failed to note the filing deadline on his office calendar. The appellant is not pro se and a two-month delay is not minimal. *See, e.g., Laboy v. U.S. Postal Service*, [103 M.S.P.R. 570](#), ¶ 9 (2006). Moreover, while the appellant's attorney asserts that he accepts full responsibility for the untimely filing, the appellant remains personally responsible for prosecuting his petition for review. He is responsible for his attorney's errors unless he shows that his diligent efforts to prosecute his appeal were thwarted, without his knowledge, by his attorney's deceptions and negligence. *See, e.g., Belcher v. U.S. Postal Service*, [101 M.S.P.R. 58](#), ¶ 7 (2006). In this instance, the appellant has not alleged that his attorney attempted to thwart his efforts to file a timely petition for review.

¶6 We therefore DISMISS the petition as untimely filed without a showing of good cause for the delay.

ORDER

¶7 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 Board's final decision regarding the denial of the appellant's request for corrective action under USERRA. See [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.ca9c.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.