

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

2011 MSPB 11

Docket No. AT-0752-10-0656-I-1

**Darryl L. Mauldin,
Appellant,**

v.

**United States Postal Service,
Agency.**

January 26, 2011

Roy L. Palmer, Conley, Georgia, for the appellant.

Randle Smith, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This matter comes before the Board upon the appellant's petition for review of an initial decision that dismissed the appeal as untimely filed without a showing of good cause for the delay. For the following reasons, we GRANT the petition for review, and AFFIRM the initial decision AS MODIFIED, still dismissing the appeal as untimely filed without a showing of good cause for the delay.

BACKGROUND

¶2 The appellant was removed from the position of PS-4 mail handler, effective July 11, 2009, based on a charge of failure to be regular in attendance. *See* Initial Appeal File (IAF), Tab 1 at 1, 9-14; Tab 4 at 8. The appellant filed a grievance through his union, but on April 2, 2010, the union informed the appellant that it had decided to withdraw his grievance. IAF, Tab 5 at 5, 7-8.

¶3 The appellant filed an appeal with the Board on April 30, 2010. *See* IAF, Tab 1. The administrative judge issued an order on timeliness in which he informed the appellant that it appeared that his appeal was untimely filed and ordered him to submit evidence and argument showing that it was timely or that there was good cause for the delay. *See* IAF, Tab 8 at 1-4. The appellant filed a response in which he acknowledged that his appeal was untimely and argued that good cause existed for the delay. IAF, Tab 9. The administrative judge dismissed the appellant's appeal as untimely filed, finding that the appellant did not show good cause for waiving the filing deadline. IAF, Tab 13, Initial Decision (ID) at 1-3.

¶4 The appellant timely filed a petition for review in which he asserts that good cause existed for his delay in filing and that the agency did not provide him with proper notice of his appeal rights.¹ *See* Petition for Review (PFR) File, Tab 2 at 2-5. The agency filed a response asserting that the appellant does not meet the criteria for review. PFR File, Tab 1.

¹ The appellant's petition for review appears to be identical to the submission he made below in response to the administrative judge's order to submit evidence and argument regarding the timeliness of the appeal. *Compare* PFR File, Tab 2, *with* IAF, Tab 9. In addition, the documents that the appellant attached to his petition for review are all in the record below.

ANALYSIS

The appellant's appeal was untimely.

¶5 Generally, an appeal must be filed no later than 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). The Board will dismiss an appeal not filed within the time limit unless the appellant establishes good cause for the delay in filing. 5 C.F.R. § 1201.22(c). An appellant bears the burden of proof on the issue of timeliness. 5 C.F.R. § 1201.56(a)(2)(ii).

¶6 The administrative judge properly found that the appellant's appeal was untimely. *See* ID at 1-2. Indeed, the appellant does not dispute that he filed his appeal more than 7 months beyond the filing deadline.² *See* PFR File, Tab 2 at 2; IAF, Tab 9 at 2. The critical question is whether the appellant demonstrated good cause for the delay in filing this appeal.

Absent other circumstances, the agency's incomplete notice does not constitute good cause to waive the filing deadline.

¶7 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 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); *Alonzo*, 4 M.S.P.R. at 184.

² The appellant asserted below that his "appeal was only delayed for about nine (9) months." IAF, Tab 9 at 3. The record shows, however, that the appeal was untimely filed by approximately 7 1/2 months. IAF, Tab 1 at 1, 10.

¶8 On review, the appellant contends, as he did below, that the agency failed to inform him as to whether the election of any applicable grievance procedure will result in a waiver of his right to file a Board appeal and the circumstances under which proceeding with one will preclude proceeding with the other.³ He also asserts that the agency omitted key language in the removal letter that could have made him aware of the consequences of late filing and he cites to *Ladrido v. Merit Systems Protection Board*, 248 F. App'x 184 (Fed. Cir. 2007). PFR File, Tab 2 at 2-4; *see* IAF, Tab 9 at 3-5.

¶9 The appellant's first argument is without merit. In its decision letter, the agency informed the appellant that, as a preference eligible, he would have the right to appeal the decision in writing to the Board within 30 calendar days from the effective date of the decision and it provided him with the address of the appropriate regional office. IAF, Tab 1 at 10. The agency also informed the appellant that he had a right to file both an appeal with the Board and a grievance on the same matter, but that the filing of a grievance would not extend the time limit for filing an appeal. *Id.* Furthermore, the agency listed the circumstances under which the appellant would be deemed to have waived access to arbitration. *Id.* Thus, the agency provided the appellant with adequate notice of his appeal rights under [5 C.F.R. § 1201.21](#)(d)(1), (2).

¶10 With regard to the appellant's second contention, the regulation at [5 C.F.R. § 1201.21](#)(a) requires agencies to provide notice of the requirements of 5 C.F.R. § 1201.22(c) which informs an employee of the consequences of late filing of an appeal:

If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide

³ We understand the appellant's claim to be that the agency failed to provide him with notice of his appeal rights pursuant to [5 C.F.R. § 1201.21](#)(d)(1), (2).

the party an opportunity to show why the appeal should not be dismissed as untimely.

[5 C.F.R. § 1201.22\(c\)](#). We find that the agency did not inform the appellant in its decision letter that his appeal would be dismissed as untimely filed unless a good reason is shown for the delay. Consequently, it did not provide him with notice of the requirements of [5 C.F.R. § 1201.22\(c\)](#), and did not provide him with proper notice of his Board appeal rights pursuant to 5 C.F.R. § 1201.21(a). Because the administrative judge did not address this issue in the initial decision, we grant the appellant's petition for review to address the impact, if any, of this finding on our good cause determination.

¶11 In *Ladrigo*, our reviewing court analyzed an appeal in which an agency did not provide Mr. Ladrigo with notice of the consequences of his failure to file a timely appeal, and Mr. Ladrigo filed his appeal 60 days late. *Ladrigo*, 248 F. App'x at 185-86. Although the court recognized that an agency's failure to provide notice of appeal rights required by the Board's regulations could, standing alone, constitute good cause for an untimely filing, the court found that the agency's incomplete notice, *coupled with other factors*, including Mr. Ladrigo's age, declaration of emotional strain, lack of English proficiency, and his pro se status at the time of the removal, in addition to his "relative diligence," constituted good cause to waive the filing deadline. *Id.* at 186-87.

¶12 Although *Ladrigo* is an unpublished decision, the Board may rely on unpublished Federal Circuit decisions if it finds the court's reasoning persuasive. *E.g.*, *Herring v. Department of the Navy*, [90 M.S.P.R. 165](#), ¶ 13 n.* (2001), *review dismissed*, 35 F. App'x 887 (Fed. Cir. 2002). We find it appropriate to rely on the court's analysis in *Ladrigo* in light of the factual similarities between that matter and this appeal. For instance, the agency in this appeal gave the appellant the same incomplete notice of his appeal rights as the agency did in *Ladrigo*. We do not believe that the agency's incomplete notice, by itself, however, is a dispositive factor in our good cause determination. Rather,

consistent with the court's analysis in *Ladrido*, we will consider the other circumstances to determine if, taken together, they justify waiving the filing deadline. Importantly, the appellant asserted in a declaration, made under penalty of perjury, that he was under emotional stress at the time he received the removal letter, that he was unsuccessful in obtaining legal counsel, that he acted reasonably and with due diligence after he "gain[ed] the information about the correct appeal time limit," and that the agency's incomplete notice contributed to his delay.⁴ See IAF, Tab 9 at 7-8.

¶13 However, there are some important differences between this appeal and *Ladrido*. For instance, Mr. Ladrido filed his appeal 60 days late, but the appellant in this case filed his appeal more than 7 months late. See *Ladrido*, 248 F. App'x at 186; IAF, Tab 1 at 1, 9. A delay of more than 7 months is significant. See, e.g., *Greenberg v. Department of Justice*, [91 M.S.P.R. 42](#), ¶ 6 (2002) (a filing delay of over six months was significant). Moreover, this delay appears to have been largely caused by the appellant's decision to utilize the grievance procedures and to wait for the resolution of those procedures before filing with the Board. Indeed, the appellant declared below that he "was given wrong or no information of [his] appeal rights to the [Board] by [his union] and by management." See IAF, Tab 9 at 7-8. However, the record reflects that the appellant received notice of the time limit for filing a Board appeal. In addition, the appellant had a union representative at the time of the removal action, the agency gave him proper notice of his right to file a grievance and a Board appeal, and it cautioned him that "the filing of a grievance will not extend the time limit for filing an appeal with the MSPB." See IAF, Tab 1 at 10. He nonetheless chose

⁴ The appellant's representative also stated, below, that the appellant had "language difficulties," but he failed to explain the nature of such difficulties. See IAF, Tab 9 at 2-4. The statements of a party's representative in a pleading do not constitute evidence, *Hendricks v. Department of the Navy*, [69 M.S.P.R. 163](#), 168 (1995), and we do not consider this allegation on review.

to pursue the grievance procedures only. The Board has consistently held that the appellant is responsible for the errors of his chosen representative. *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981). Moreover, it is well-settled that awaiting the outcome in another forum will not provide good cause for an untimely appeal. See *Masdea v. U.S. Postal Service*, [90 M.S.P.R. 556](#), ¶ 8 (2002); *Muse v. U.S. Postal Service*, [82 M.S.P.R. 342](#), ¶ 11 (1999); *Allison v. U.S. Postal Service*, [81 M.S.P.R. 335](#), ¶ 13 (1999).

¶14 We conclude that this appeal does not present the totality of circumstances that, when taken together by the court in *Ladrado*, constituted good cause to waive the filing deadline. See *Ladrado*, 248 F. App'x at 186-87. In the absence of such circumstances, we do not find that the appellant has demonstrated good cause to waive the filing deadline and we affirm the initial decision as modified herein.

ORDER

¶15 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.