

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

RAMONA GILL HERRING,  
Appellant,

DOCKET NUMBER  
DC-844E-12-0778-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: July 1, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Corinna A. Ferrini, Esquire, Washington, D.C., for the appellant.

Evelyn K. Payne, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge, which dismissed the appellant's appeal as untimely filed without good cause shown.

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

#### **DISCUSSION OF ARGUMENTS ON REVIEW**

In a July 6, 2012 reconsideration decision, the Office of Personnel Management (OPM) denied the appellant's application for disability retirement benefits. Initial Appeal File (IAF), Tab 1 at 9-12. The decision notified the appellant that she could file an appeal within 30 days of the decision, or 30 days of the receipt of the letter – whichever was later. *Id.* at 12. On August 23, 2012, the appellant filed an appeal. *Id.* at 1.

Upon receiving the appeal, the administrative judge issued an acknowledgment order alerting the appellant to the potential untimeliness of the appeal and directing the appellant to show that the appeal was timely filed or that good cause existed for the filing delay. IAF, Tab 2 at 3. The appellant, through her attorney, argued that the Board should waive the deadline because communication errors within the law firm retained by the appellant caused the

filing delay. IAF, Tab 6 at 4-14. The administrative judge, however, dismissed the appeal as untimely filed. IAF, Tab 9 at 4.

In her petition for review, the appellant argues that, on August 2, 2012, she consulted with her attorney regarding OPM's final decision. Petition for Review (PFR) File, Tab 1 at 6. During the consultation, the appellant informed her attorney that she received the OPM decision on July 14, 2012. *Id.* The attorney determined that the appellant must file the appeal on or before Monday, August 13, 2012. *Id.* Following this meeting, the appellant signed a retainer, and a third party paid for her attorney in full via online payment. *Id.* However, due to the alleged breakdown in communication within the attorney's law firm, the attorney was unaware that the third party had made the payment necessary for the attorney to initiate representation of the appellant until August 23, 2012. *Id.* The attorney immediately filed the appeal with the Board, which at this point was 10 days past the filing deadline. IAF, Tab 1.

The Board requires that appeals be filed no later than 30 days after the effective date of the action being appealed, or 30 days after the appellant receives the agency decision, whichever is later. [5 C.F.R. § 1201.22\(b\)](#). The Board may grant or deny a waiver of a time limit for filing a petition after considering all of the facts and circumstances of a particular case. *See Smith v. Department of the Army*, [105 M.S.P.R. 433](#), ¶ 5 (2007). To establish good cause for untimely filing, the appellant has the burden of showing by a preponderance of the evidence that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Id.*; *see also Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980); [5 C.F.R. § 1201.56\(a\)\(2\)\(ii\)](#). To determine whether the 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 the existence of circumstances beyond his control that affected his ability to comply with the time limits, or of unavoidable

misfortune which caused his inability to file his petition in a timely manner. *Smith*, [105 M.S.P.R. 433](#), ¶ 5.

In her petition for review, the appellant, through her attorney, does not dispute that the appeal was filed untimely. PFR File, Tab 1 at 8. The appellant instead argues that the administrative judge erred in finding that good cause did not exist to waive the filing deadline because, despite that the appellant acted with ordinary prudence, the law firm thwarted her timely filing of appeal. *Id.* at 8-15.

It is well settled, however, that the appellant is responsible for the errors of her chosen representative. *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981). A limited exception to this general rule exists where an appellant proves that her diligent efforts to prosecute her case were thwarted by the representative's deception and negligence. *Dunbar v. Department of the Navy*, [43 M.S.P.R. 640](#), 643-44. In *Dunbar*, the Board found good cause to extend the deadline because the attorney's secretary failed to mail an appeal in an apparent deliberate act of defiance against the attorney. *Id.* at 642, 644-65. The Board also noted that Mr. Dunbar checked repeatedly on the status of his appeal, reminded the attorney of the deadline, and personally visited the attorney's office in an attempt to mail the appeal himself. *Id.* at 644.

However, the Board has found that, even where an appellant's representative misleads her as to the status of a filing, the appellant has a personal duty to monitor the progress of her appeal at all times and not leave the matter entirely to her attorney. For instance, in *Miller v. Department of Homeland Security*, [110 M.S.P.R. 258](#) (2008), the Board found that the appellant had not shown good cause to excuse an approximately 21 months filing delay, even though her attorney had falsely informed her that he had filed her appeal, because the appellant had made no inquiries to the Board to confirm the attorney's filing. *Id.*, ¶¶ 10-12. Likewise, in *Soletto v. Department of Agriculture*, [58 M.S.P.R. 253](#) (1993), the Board found no showing of good cause

where the attorney erroneously informed the appellant that it was unnecessary to file a corrected petition for review and the appellant did not contact the Board for 8 months. *Id.* at 256.

Here, the appellant argues that the attorney thwarted her effort to prosecute her case by missing the filing deadline even though the appellant had acted with due diligence by signing the retainer and making a payment.<sup>2</sup> PFR File, Tab 1 at 8. However, the appellant's case more closely resembles those where the Board found that an attorney's mere negligence does not amount to good cause to extend the filing deadline. *See Miller*, [110 M.S.P.R. 258](#); *Soletto*, [58 M.S.P.R. 667](#), 670. Moreover, there is no indication that the appellant took any steps to personally monitor the filing of her appeal after signing the retainer and initiating payment. Thus, we agree with the administrative judge that the appellant failed to show good cause for the untimely filing of her appeal.

We therefore DENY the appellant's petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

#### **NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

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<sup>2</sup> In her petition for review, the appellant cites to several Board and Federal Circuit Court decisions, including *Dow v. Office of Personnel Management*, [66 M.S.P.R. 21](#) (1994). In *Dow*, the Board found good cause for a one-day filing delay where a legal assistant in the appellant's attorney's office failed to mail a completed appeal due to the illness of her child. *Id.* at 24. We are not persuaded that *Dow*, or any of the other cases cited by the appellant, dictate that the Board find good cause in the instant case.

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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.