

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,  
Appellant,

DOCKET NUMBER  
DC-0752-23-0457-I-1

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: May 3, 2023

<p style="text-align:center"><b>THIS DOCUMENT CONTAINS IMPORTANT INFORMATION ABOUT THIS APPEAL AND ITS PROCESSING. PLEASE READ THE ENTIRE DOCUMENT CAREFULLY.</b></p>
---

**ORDER TO SHOW CAUSE - TIMELINESS**

There is a question whether this appeal was filed within the time period required by the Board's regulations. As a result, the Board might dismiss the appeal as untimely filed without addressing the merits of the case. This Order provides necessary information concerning the timeliness issue and steps the appellant must take to show that the Board should not dismiss the appeal as untimely.

I **ORDER** the parties to follow the procedures set out below. If either party has a question regarding any of the case processing instructions in this Order, you may call this office at the phone number listed under my signature at the end of the Order for assistance.

**NOTICE AND ORDER TO THE APPELLANT**

Generally, you must file an appeal with the Board no later than 30 calendar days after the effective date, if any, of the action you are challenging, or 30 calendar days after the date you receive the agency's decision, whichever is later.

5 C.F.R. § 1201.22(b). Under 5 C.F.R. § 1201.4(*l*), the filing or refiling date for each of the ways in which an appeal can be filed or refiled is: Mail – the postmark date, but if there is no legible postmark date, mailing is presumed to have been five business days before receipt; Personal Delivery – the date we receive the appeal; Fax – the date of the fax; Commercial Overnight Delivery – the date the document was delivered to the commercial overnight delivery service; E-filing – the date of filing by e-filing is the date of electronic submission. **It appears that the filing period in this case began on June 22, 2023, and that your appeal was filed by e-file on May 3, 2023. It therefore appears that your appeal was filed 20 days late.** Because your appeal appears to have been filed after the time limit under these rules, it may be untimely.

If you and the agency agreed in writing to participate in an alternative dispute resolution process before filing your appeal, the time limit for filing your appeal is extended for an additional 30 calendar days, for a total of 60 calendar days. In such a case, your response to this Order must include a copy of the written agreement.

Further, there is an exception to the 30-day filing rule of 5 C.F.R. § 1201.22(b), set out in 5 C.F.R. § 1201.154(b). Pursuant to this provision, an appellant who was subject to an action that is appealable to the Board and who filed a timely formal discrimination complaint with the agency, may file an appeal (1) within 30 days after receipt of the agency resolution or final decision on the complaint or, (2) at any time after the expiration of 120 calendar days if the agency has not resolved the matter or issued a final decision within the 120-day period.

Before the Board will consider any other issue raised by your appeal, you must show by preponderant evidence that the appeal was filed on time or that good cause exists for the delay in filing. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue. 5 C.F.R.

§ 1201.4(q). In other words, you must show that it is more likely than not that your appeal was filed on time or that good cause exists for the delay.

Accordingly, if you claim that you filed your appeal on time under any of the filing rules listed above, I **ORDER** you to file evidence and/or argument showing that you did so. You must provide all of the details explaining your actions concerning the filing. If the apparent untimeliness of your appeal is due to your late receipt of the decision you are appealing, you must also submit evidence and argument as to the date you received it. If you have postal receipts or other proof of mailing, you should send a legible copy of them with your response.

If you did not file your appeal on time, I **ORDER** you to file evidence and/or argument showing that good cause exists for the delay in filing. To show that there was good cause for a delay in filing, you must show that you acted reasonably and with due diligence under the particular circumstances of your case. The factors the Board will look at to determine whether you acted reasonably include, but are not limited to: (1) the length of the delay; (2) whether you were notified of the time limit or were otherwise aware of it; (3) the existence of circumstances beyond your control which affected your ability to comply with the time limit, and the possibility of negligence on your part; (4) circumstances which show that any neglect on your part was excusable; (5) whether there was unavoidable casualty or misfortune that affected your ability to timely file your appeal; and (6) whether not applying the time limit to you would harm the agency. In your response to this Order addressing the timeliness issue, be as specific as possible by giving all of the details. You should also include any evidence that supports the reason for your delay.

If an illness prevented you from filing your appeal within the time limit, you must identify the time period during which you suffered from the illness, submit medical evidence and any other supporting evidence showing that you suffered from the illness during the relevant time period, and explain how the

illness prevented you from filing your appeal on time or requesting an extension of time to file. If medical evidence is not available, you must submit other supporting evidence and explain why medical evidence is not available.

Any explanation of the reason for a late appeal must also address why you could not have filed a timely request for an extension of the filing time limit.

Your response to this Order need not be in the form of an affidavit, sworn statement, or declaration under penalty of perjury, 28 U.S.C. § 1746 (a form for which is found in the Board's regulations at 5 C.F.R. Part 1201, Appendix IV). However, although the Board has held that an unsworn statement by an appellant is considered admissible evidence, the fact that it is unsworn may detract from its probative value. *Scott v. Department of Justice*, 69 M.S.P.R. 211, 228 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). Although there are limited circumstances in which a hearing may be held on the question of the timeliness of an appeal, you should submit all evidence and argument you wish me to consider on that issue, and not withhold anything in expectation that a hearing may be held. **Your submission must be filed so that it is received by me and the agency representative no later than May 11, 2023.**

#### **ORDER TO THE AGENCY**

The agency is **ORDERED** to file any evidence and argument that it has on the timeliness issue no later than **May 18, 2023**.

\* \* \* \*

Unless I tell the parties otherwise, the record on the timeliness issue will close on **May 18, 2023**. That means I will not accept any more evidence or argument on that issue that is filed after that date unless the party submitting it shows it was not readily available prior to the close of the record. Notwithstanding the close of the record, however, pursuant to 5 C.F.R. § 1201.59(c), a party must be allowed to respond to new evidence or argument submitted by the other party just before the close of the record.

FOR THE BOARD:

\_\_\_\_\_/S/  
Joshua Henline  
Administrative Judge

## CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

### Appellant

Electronic Mail      Martin Akerman  
2001 North Adams Street  
Unit 440  
Arlington, VA 22201

### Agency Representative

Electronic Mail      Eugene R. Ingrao, Sr.  
Department of the Army  
Attorney- Advisor  
Office of the Chief Counsel, NGB  
111 S. George Mason Drive  
AHS-2/Room 3TI-308  
Arlington, VA 22204

---

May 3, 2023  
(Date)

---

/s/  
Tonya Holman  
Paralegal Specialist