

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)	
)	
Tri-County Builders Supply)	
)	CWA Appeal No. 03-04
Docket No. CWA-9-2000-0008)	
)	

ORDER DENYING MOTION FOR RECONSIDERATION

I. Background

Appellant, Tri-County Builders Supply ("Tri-County"), has filed a motion for reconsideration before the Environmental Appeals Board ("Board") of a final order issued by the Board dismissing the above-captioned matter. In an order dated May 24, 2004, the Board found that Tri-County's appeal had been untimely filed, and, finding no "special circumstance" that would justify the late filing, the Board dismissed the appeal on timeliness grounds.¹ See

¹ As explained in more detail in our Order dismissing Tri-County's appeal, Tri-County filed its appeal with the Regional Hearing Clerk instead of the Board. Order Dismissing Appeal (EAB, May 24, 2004). It was not until more than three weeks had elapsed, and well past the filing deadline, that Tri-County filed its appeal with the Board. The only explanation offered at that time for the late filing was that "the failure to file the brief with [the Board] was a clerical error;" the appellant, however, did not elaborate on the clerical error. See *id.* at 5. In dismissing the appeal the Board explained that it typically requires strict compliance with the time limits set forth in the rules of practice governing penalty appeals, and that it will not excuse a late-filed appeal unless it finds special circumstances (continued...)

Order Dismissing Appeal (EAB, May 24, 2004). In its motion, Tri-County requests that the dismissal order be set aside. On June 25, 2004, U.S. EPA Region IX (the "Region") filed a motion in opposition to Tri-County's request.

For the reasons set forth below, Tri-County's motion for reconsideration is denied.

II. Discussion

Tri-County's motion for reconsideration is untimely. According to 40 C.F.R. § 22.32, parties seeking reconsideration of a final order have ten (10) days after service of the final order to file a motion for reconsideration. Service is effective upon mailing; however, when service is effected by first class mail, five (5) additional days are added to the time allowed for filing. 40 C.F.R. § 22.7. In the instant case, the Board issued and served its order dismissing Tri-County's appeal on May 24, 2004. Because the order was served via first class mail, Tri-County had until June 8, 2004, to file its motion for reconsideration with the

¹(...continued)

to justify the untimeliness. *Id.* Finding no special circumstance warranting the relaxation of the procedural deadline, and noting that the only explanation provided by Tri-County -- a clerical error -- was neither extraordinary nor an adequate basis for accepting a late-filed appeal, the Board dismissed Tri-County's appeal on timeliness grounds. *Id.* at 8.

Board. Tri-County's motion for reconsideration was received by the Board on June 9, 2004, beyond the time specified in the applicable rules for filing such a motion. No explanation is offered for the out-of-time filing.

Tri-County's motion for reconsideration is therefore rejected as untimely. As we stated in our order dismissing this appeal, "The filing requirements specified in 40 C.F.R. § 22.30 are not merely procedural niceties. Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process. *Further, they ensure that the Board's resources are reserved for those cases involving both important issues and serious and attentive litigants.*" Order Dismissing Appeal at 7 (EAB, May 24, 2004) (emphasis added). Tri-County has for a second time failed to adhere to the procedural rules that govern these proceedings, and we see no reason why this new delay should be excused.² Tri-County's motion for reconsideration is therefore denied on this basis.

² In a declaration attached to Tri-County's motion for reconsideration, one of Tri-County's counsel maintains that the earlier failure to file a timely Notice of Appeal was the result of misconduct by an "individual staff member" of counsel's firm and that counsel had not become aware of the failure until it was too late to cure it. Even accepting these representations as factually accurate, we find it telling that, despite having been put on clear notice by the dismissal order that this Board treats filing deadlines as serious requirements, the motion for reconsideration was itself filed out of time.

Significantly, even if Tri-County's motion had been timely, we would still find it insufficient as a basis for setting aside our original ruling. Tri-County's counsel argues in general that the appellant's failure to file a Notice of Appeal in a timely manner was the result of misconduct³ by an individual staff member of counsel's firm, and that counsel for appellant was not aware of the staff member's actions until the Notice of Appeal was already approximately 30 days overdue. Motion for Reconsideration of Order Dismissing Appeal (June 9, 2004). More specifically, counsel represents that prior to the filing deadline he had to leave the office to attend to a family emergency. See Declaration of Patrick G. Cherry in Support of Motion for Reconsideration of Dismissal of Appeal at 3. According to counsel, before leaving, he left instructions with his secretary that the appeal was to be filed with the Board. *Id.* Nonetheless, in his absence, the secretary filed the appeal with the Regional Hearing Clerk instead of the Board. *Id.* at 4. Counsel returned to the office on June 23, 2003,

³ We note that counsel uses the terms "misconduct" and "clerical error" interchangeably to refer to a secretary's failure to file Tri-County's appeal with the Board, and instead filing the appeal with the Regional Hearing Clerk. In our view, the term "misconduct" connotes a level of wilful malfeasance not evidenced in the scenario described by counsel. Rather, "clerical error" would appear to be the better descriptor of a circumstance like this one in which a secretary essentially fails to follow instructions. Accordingly, while there might be a circumstance in which "misconduct" in the nature of a dishonest and unforeseeable act might rise to the level of a "special circumstance" justifying a late-filed appeal, we do not find such a circumstance here.

-- the last day for filing the appeal with the Board. *Id.* at 3. He concedes that it was not until July 15, 2003, that the filing error was discovered. According to counsel, upon discovering the error, he contacted the Clerk of the Board, who suggested to him that he file his appeal with the Board "as soon as possible," *id.* at 4-5, intimating that as a result of this communication he was left with the impression that filing "as soon as possible" might serve to correct the error. Finally, apparently claiming unfair surprise, counsel submits that Tri-County was unaware that the Board was even contemplating dismissal as a sanction for the late filed appeal until he received the Board's dismissal order. Motion for Reconsideration of Order Dismissing Appeal at 2 (June 9, 2004).

Our case law is clear that "the Board does not excuse a late-filed appeal unless it finds *special circumstances* to justify the untimeliness." *In re B&L Plating, Inc.*, slip op. at 11, CAA Appeal No. 02-08 (EAB, Oct. 20, 2003), 11 E.A.D. ___ (emphasis added); *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996) ("only rarely has [the Board] accepted appeals that are not timely filed") (emphasis added). See also *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995); *In re Prod. Plated Plastics, Inc.*, 5 E.A.D. 101, 104 (EAB 1994); *In re B & B Wrecking & Excavating, Inc.*, 4 E.A.D. 16, 17 (EAB 1992). We have further stated that "failure to ensure that a petition for review is received by the filing deadline will

generally lead to dismissal of the petition on timeliness grounds." *In re Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000). Moreover, the Board has denied review of petitions that, like the one here, have been mistakenly filed with Regional Hearing Clerk instead of the Board. See, e.g., *In re Apex Microtechnology, Inc.*, EPCRA Appeal No.93-2 (July 8, 1994) (Order Dismissing Appeal) (appeal dismissed as untimely when filing received by the Board after the filing deadline had been originally sent to the Regional Hearing Clerk in error); *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329-30 (EAB, 1999) (petition filed with Region II untimely filed with the Board dismissed on timeliness grounds).

While we regret the family emergency that caused counsel to step away from his case responsibilities, we nonetheless find the circumstances outlined above as falling short of the "special circumstances" test enunciated in the caselaw discussed above. First, we find inapposite counsel's contentions that appellant was surprised by our dismissal order and that he had followed the advice given by the Clerk of the Board to file "as soon as possible." While perhaps offering an explanation regarding why a greater effort was not made as part of Tri-County's initial submission to the Board to justify filing late, neither of these considerations are "special circumstances" that in any way explain the failure to timely file in the first instance. Moreover, even

a cursory examination of the Board's case law would have informed counsel of our practice and the seriousness of the situation.

The other circumstances cited by counsel likewise fall short of the kind of "special circumstances" that we have found sufficient to justify late filings. Rather, in our view, the errors that led to the late-filed appeal fall into the category of insufficient oversight and inattentiveness. We have held on various occasions that lapses of this kind on the part of legal representatives, a client, or even a pro se litigant, do not excuse failure to timely file documents or otherwise comply with the Agency's procedural rules. *E.g.*, *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Rybond Inc.*, 6 E.A.D. 614, 626-28 (EAB 1996); *In re Gary Dev. Co.*, 6 E.A.D. 526, 530-31 (EAB 1996).

Even accepting counsel's representations that, before leaving, he left instructions with his secretary that the appeal was to be filed with the Board, we find it troubling that no one in counsel's firm detected the error until almost a month after the deadline. Apparently, no one in counsel's firm monitored this case during counsel's absence. Moreover, after his return to the office, counsel did not personally review the Tri-County file to ensure

that service had been perfected consistent with section 22.30.⁴ This strikes us as difficult to reconcile with the statement in counsel's declaration that "under normal circumstances" he would have personally monitored the process.⁵ Had counsel personally verified the file upon his return, or had his firm monitored this case in his absence, the secretary's error might have been corrected early enough to allow for either a timely filing with the Board or the submission of a motion under 40 C.F.R. § 22.7 requesting an extension of time. We do not think that it is asking too much to expect this level of vigilance. The fact that the secretary may have made the error in the first instance neither diminishes her employer's accountability for her error or explains the firm's failure to detect and correct that error earlier.⁶

⁴ See Declaration of Patrick G. Cherry in Support of Motion for Reconsideration of Dismissal of Appeal at 4 ("I did not personally review the proof of service because I felt confident, after my very explicit directions that Ms. Zimmerman would ensure the documents were filed at the address and within the time I indicated.").

⁵ See *id.* at 3 ("Under normal circumstances, I would have monitored the copying of documents and the actual process of preparing them for delivery * * *").

⁶ We have stated in the past that: "By insisting on strict compliance [with the regulatory time limits for perfecting an appeal] the Board has sought, among other things, * * * to limit reliance on the infinitely variable 'internal operations' of litigants and law firms as determinants of when obligations must be met * * *." *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996).

In short, even if Tri-County's motion for reconsideration had been timely filed, we would not change our earlier ruling because Tri-County has failed to persuade us that our dismissal of the appeal was in error.

III. *Conclusion*

For the foregoing reasons, Tri-County's motion for reconsideration is denied.

So ordered this 26th day of July 2004.⁷

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/ _____

Scott C. Fulton
Environmental Appeals Judge

⁷ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Tri-County Builders Supply, CWA Appeal No. 03-04, were sent to the following persons in the manner indicated:

By First Class Mail Postage Prepaid:

Robert L. McCord Jr., Esq.
Taylor & McCord & Praver
721 East Main Street
P.O. Box 1477
Ventura, California 93002

By Pouch Mail:

Danielle Carr
Regional Hearing Clerk
Office of Regional Counsel
U.S. EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Judge Carl C. Charneski
Office of Administrative Law Judges (1900L)
Ariel Rios Building
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Marcela von Vacano, Esq.
Assistant Regional Counsel
U.S. EPA Region IX (ORC-2)
75 Hawthorne Street
San Francisco, CA 94105-3901

Dated: July 27, 2004

/s/
Annette Duncan
Secretary