IN RE POLO DEVELOPMENT, INC., AIM GEORGIA, LLC, AND JOSEPH ZDRILICH

CWA Appeal No. 16-01

ORDER DISMISSING NOTICE OF APPEAL AS UNTIMELY

Decided March 17, 2016

Syllabus

On January 13, 2016, Polo Development, Inc., AIM Georgia, LLC, and Mr. Joseph Zdrilich ("Respondents") filed a motion seeking to submit an out-of-time appeal of an Initial Decision and Order issued against them on December 1, 2015. Respondents claim that "special circumstances" justify an extension of time in this case.

Held: Motion denied and Notice of Appeal dismissed. The Board holds that it retains discretion under the Consolidated Rules of Practice, 40 C.F.R. part 22, to accept late-filed appeals when circumstances warrant. In this case, however, the Board finds that circumstances did not warrant accepting the late-filed appeal. Instead, the evidence established that EPA served the Initial Decision and Order on Respondents, that Respondents' counsel received the Initial Decision and Order at least two weeks before the appeal deadline, and that Respondents' counsel did not exercise due diligence in monitoring the docket of the enforcement proceedings below. The Board concludes that all of these factors weigh against the Board finding special circumstances to exercise its discretion in this instance.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

On December 1, 2015, Administrative Law Judge M. Lisa Buschmann issued an Initial Decision and Order finding Polo Development, Inc., AIM Georgia, LLC, and Mr. Joseph Zdrilich ("Respondents") liable for discharging dredged or fill material into navigable waters in violation of Clean Water Act sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344, and assessing a $32,550 penalty. On that same date, the U.S. Environmental Protection Agency's Headquarters Hearing Clerk signed a certificate of service attesting that she had sent copies of the Initial

Decision and Order to counsel for Respondents and EPA Region 5 "by Electronic and Regular Mail."

On January 13, 2016, Respondents filed with the Environmental Appeals Board ("Board") a Motion to File Notice of Appeal *Nunc pro Tunc* ("Motion") and a one-page Notice of Appeal. In their Motion, Respondents acknowledge that their appeal is late but assert that they "just learned" that the Initial Decision and Order had been issued. Respondents seek permission to file an untimely Notice of Appeal of Judge Buschmann's Initial Decision and Order and request "a reasonable time to research, write, and file" an accompanying appeal brief. Motion at 1.

Respondents claim that "special circumstances" justify an extension of time in this case: namely, that counsel never received the copy the Headquarters Hearing Clerk sent via "Regular Mail"; that the copy sent via "Electronic Mail" was routed to counsel's spam folder and thus not timely discovered; and that counsel failed actively to monitor the case's status by checking the Office of Administrative Judges' on-line docket or by telephoning that office. Motion at 2, 4-5. Respondents also argue that "good cause" justifies an untimely appeal in this case, for the same reasons presented to support their "special circumstances" claim, and assert that allowing such an appeal to go forward would not prejudice opposing parties. *Id.* at 4-5.

On January 29, 2016, EPA Region 5 filed a Response in Opposition to Respondents' Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal *Nunc pro Tunc* ("Response"). The Region contends that Respondents have not shown any special circumstances to justify their untimeliness and have not established good cause for an extension of time to file an appeal. Response at 7-12.

The Consolidated Rules of Practice ("Consolidated Rules") governing this appeal establish a thirty-day appeal period that begins running the day after an initial decision is served and is extended for an additional five days if service is by mail. 40 C.F.R. §§ 22.7(a), (c), .30(a). Service is complete upon mailing. *Id.* § 22.7(c). In this case, the Headquarters Hearing Clerk's service of the Initial Decision and Order was complete upon mailing on December 1, 2015. Counting from December 2, 2015 (the first day of the appeal period), Respondents had thirty-five days, or until January 5, 2016, to timely file a notice of appeal and accompanying brief. Thus, Respondents' Notice of Appeal, filed January 13, 2016, was eight days late. The Notice also was unaccompanied by an appeal brief or a summary of the primary issues Respondents intended to dispute, contrary to the Consolidated Rules' requirements at 40 C.F.R. § 22.30(a)(1).

The Board typically requires strict adherence to the filing deadlines contained in the Consolidated Rules. *See, e.g.*, *In re B&L Plating, Inc.*, 11 E.A.D. 183, 189-91 (EAB 2003); *In re Tri-County Builders Supply*, CWA Appeal No. 03-04, at 5-6 (EAB May 24, 2004) (Order Dismissing Appeal) (collecting cases). Timely filings promote certainty and uniformity in the application of regulatory deadlines; limit reliance on the infinitely variable internal operations of litigants and law firms as determinants of when obligations must be met; preserve the Agency's adjudicative resources for litigants who timely exercise their appeal rights; and ensure that the Agency's procedural rules are applied equally to all affected parties. *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996).

The Board may relax a filing deadline in appropriate cases, either: (1) with respect to a timely filed motion requesting an extension, for good cause shown after considering prejudice to other parties; or (2) on its own initiative. 40 C.F.R. § 22.7(b). The first scenario is inapplicable here because Respondents' motion was not timely filed. In the second scenario, the Board has routinely declined to excuse late-filed appeals unless it finds "special circumstances" to justify the untimeliness. *B&L Plating*, 11 E.A.D. at 190-91 & n.15 (citing cases finding "special circumstances" where timely filing delayed by sudden attorney illness or delivery delays beyond litigant's control (e.g., aircraft problems)); *Gary Dev.*, 6 E.A.D. at 533 (citing case finding "special circumstances" where timely filing delayed because Agency provided erroneous filing information in writing, upon which petitioner relied).

In the present case, special circumstances do not exist. First, with respect to Respondents' claim that their counsel never received the copy of the Initial Decision and Order mailed on December 1, 2015, the Board cannot fully credit it. The Headquarters Hearing Clerk mailed that copy to counsel's address, which has not changed throughout these proceedings. Moreover, the EPA Region 5 Hearing Clerk served a second copy of the Initial Decision and Order on Respondents' counsel on December 14, 2015, via certified mail, return receipt requested, using the same address.[1] That copy successfully arrived on December 17, 2015, as shown

[1] This second service of the Initial Decision and Order appears to have been unnecessary under the provisions of EPA's pilot program on hearing clerk functions. *See* Memorandum from John Reeder & Lawrence Starfield, U.S. EPA, to Reg'l Counsel & Deputy Reg'l Counsel, *Pilot Program to Migrate Certain Regional Hearing Clerk Functions to the Headquarters Hearing Clerk* (Apr. 27,

by the signed return receipt,[2] raising the implication that the first copy also likely arrived successfully. Even if the first copy did not so arrive, and giving Respondents the benefit of the doubt, Respondents' counsel knew or should have known no later than December 17, 2015, that Judge Buschmann had rendered her decision and that the appeal period had begun to run. Respondents readily could have filed a motion for an extension (or even a proper appeal) at that time, rather than waiting nearly a month before acting, but they did not do so.

Furthermore, Respondents' counsel admits that he failed diligently to monitor the Administrative Law Judges' docket or contact their office for status updates of the pending case. In light of this admission, counsel's claim of special circumstances founders because an attorney "stands in the shoes of his or her client," and "the failings of a client's attorney [do] not excuse compliance with the Consolidated Rules." *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 665, 667 (EAB 2004); *see In re Burrell*, 15 E.A.D. 679, 688-89 (EAB 2012); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 317-21 (EAB 1999); *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990). Without more, counsel's own lack of diligence does not rise to the level of special circumstances.

The requirements of the Consolidated Rules "are not procedural niceties that parties are free to ignore." *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *see In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005). Although the Board retains discretion to accept a late-filed appeal when circumstances warrant, the evidence that the Initial Decision and Order was served twice, the documentation confirming counsel's receipt of the Initial Decision and Order two weeks before the appeal deadline, and counsel's lack of diligence in monitoring the docket weigh against the Board exercising its discretion here.

2012). The fact that the second service may have been duplicative, however, does not make it irrelevant to the Board's inquiry.

[2] Ms. Christine Haluska signed the return receipt. That counsel himself did not sign the return receipt is no impediment to proper service at his address of record. *See, e.g.*, *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (holding that "when service is effectuated by certified mail, the letter need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual").

Accordingly, the Board denies Respondents' Motion and dismisses their Notice of Appeal.

So ordered.