

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

_____)	
SHERRY M. BRITTON)	
)	
Complainant,)	
)	
v.)	Case No. 01-AC-346(CV,FM,RP)
)	Date: February 2, 2004
OFFICE OF THE ARCHITECT)	
OF THE CAPITOL)	
)	
Respondent.)	
_____)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION AND ORDER OF THE BOARD OF DIRECTORS
ON EMPLOYING OFFICE’S MOTION TO DISMISS, OR IN THE
ALTERNATIVE TO STRIKE, COMPLAINANT’S PETITION FOR REVIEW

I. Introduction

The Board, by decision and order dated June 3, 2003, remanded this matter with instructions to the hearing officer. The hearing officer subsequently issued his dispositive decision on November 5, 2003. The Office of Compliance’s Executive Director transmitted that decision to the parties by U.S. certified mail, return-receipt requested, on November 5, 2003. His transmittal letter advised the parties that the hearing officer’s decision had been entered into the records of the Office on November 5, 2003, and that the appeal period ran from that date..

The Complainant filed her petition for review (“PFR”) with the Office on Monday, December 8, 2003.

Section 406(a) of the Congressional Accountability Act (“the Act”) [2 U.S.C. §1406(a)] and §8.01(a) of the Office’s Procedural Rules prescribe that any aggrieved party may file a PFR of a hearing officer’s decision “not later than 30 days after entry of the decision in the records of the office.”

II. Positions of the Parties

A. Complainant

Complainant acknowledges that she did not file her appeal within 30 days after the hearing officer’s decision was entered into the records of the office.¹ However, the Complainant contends that her PFR was timely filed under §1.03(c) of the Office’s Procedural Rules, which adds a prescribed number of days as a time allowance for receipt of mailed documents, whenever a person or party has the right or is required to do some act within a prescribed period “after the service of a notice or other document upon him or her” and the notice or document is mailed. The number of days added is dependent upon the method of service for the mailing of official notices (5 days for regular mail; 2 days for expedited delivery or express mail; actual date of receipt for certified mail, return-receipt requested). Complainant submits that even if she had received the Executive Director’s November 5, 2003 certified mail transmittal letter on the following day,² her December 8th filing would have fallen within the mandated 30-day period.

B. Respondent

Respondent argues that Complainant’s PFR was filed untimely under Section 406(a) of the Act, and §8.01(a) of the Procedural Rules: because the clock starts ticking upon entry of the decision in the records of the Office (November 5, 2003), and not upon any later date when the Complainant receives the Office’s mail transmitting the decision. Respondent submits that this CAA requirement is unequivocal and dispositive of the appeal. Respondent supports its position by citation of case law addressing rules of statutory construction. Respondent additionally relies upon judicial precedent applying Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which also starts the appellate clock from the date of entry of a judgment or order. Accordingly, Respondent moved that the appeal be dismissed or that Complainant’s PFR be stricken.

¹ Complainant and Respondent correctly compute the 30th day as being Friday, December 5, 2003. The Complainant filed her PFR the following Monday, the very next business day, which even by the Complainant’s computation would have been the 31st day.

² Complainant’s counsel acknowledges receiving Executive Director’s letter but represents that he does not recall the date of receipt. The Office did not receive the “green card” confirming receipt.

III. Discussion

Complainant does not proffer any equitable basis for the Board to accept her PFR if it were untimely filed or otherwise contend that the circumstances underlying her filing of the PFR constitute “excusable neglect.” . Complainant contends only that her PFR was timely filed, computing commencement of the appeal period from the earliest date that she could have received the mailed notice of the hearing officer’s decision. However, Respondent submits that the PFR was untimely because it was not filed within 30 days after the Office entered the hearing officer’s decision into its records.

This constitutes the Board’s first occasion to decide the petition for review time computation issue raised by this appeal. We are persuaded that the appeal time period runs from the date that a hearing officer’s decision is entered into the Office’s record. In this regard, the Office’s procedural rule §1.03(c) for extending filing periods is inapposite because that provision applies only to situations keyed to the *service* of a mailed notice or document on a person or party. Section 406(a) of the CAA, on the other hand, specifically links the appeal period to the entry of a decision in the Office’s records, and that is how the federal courts have interpreted essentially identical language in the Federal Rules of Appellate Procedure. In its leading decision on this point, the U.S. Court of Appeals for the Federal Circuit, computing the appeal period from the date of a judgment’s entry into the record, dismissed an appeal for having been filed two days late. *Sofarelli Associates, Inc. v. The United States*, 716 F.2d 1395 (Fed. Cir. 1983). Accord, *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978); *Patricio B. Bautista v. Anthony J. Principi, Secretary of Veterans Affairs*, 2003 U.S. App. LEXIS 17609 (Fed. Cir. 8/1/2003); *Amos Cox v. Anthony J. Principi, Secretary of Veterans Affairs*, 2003 U.S. App. LEXIS 2432 (Fed. Cir. 1/31/2003); *Florida Rock Industries, Inc. v. United States*, 2000 U.S. App. LEXIS 21752 (Fed. Cir. 2000); *United States of America v. Glenn Efrén Sisneros*, 2001 U.S. App. LEXIS 14414 (10th Cir. 2001); *Horoutunian v. INS*, 87 F.3d 374, 377 (9th Cir. 1996); *Christopher Binder v. District of Columbia, et al.*, 1992 U.S. App. LEXIS 23143 (D. C. Cir. 1992); *Welsh v. Elevating Boats, Inc.*, 698 F.2d 230, 231-32 (5th Cir. 1983).

Accordingly, we find that the Complainant’s petition for review was untimely filed.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office’s Procedural Rules, the Board grants the Respondent’s motion to dismiss this appeal on the basis of untimeliness.

It is so ordered.

CERTIFICATE OF SERVICE

I hereby certify that on this day of February 2, 2004, I delivered a copy of this Decision of the Board of Directors to the following parties by the below identified means:

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