In the Matter of:

LINDA GASS, **ARB CASE NO. 03-035**

COMPLAINANT, **ALJ CASE NO. 02-CAA-2**

v. **DATE: January 14, 2004**

U.S. DEPARTMENT OF ENERGY;
OFFICE OF THE INSPECTOR GENERAL,
U.S. DEPARTMENT OF ENERGY;
MR. JAMES PUGH; MS. SANDY SCHNEIDER;
LOCKHEED MARTIN CORPORATION; and,
LOCKHEED MARTIN ENERGY SYSTEMS, INC.

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward Slavin, Jr., Esq., ***St. Augustine, Florida***

For the U.S. Department of Energy:
Jacqueline M. Becker, Esq., ***Department of Energy, Washington, D.C.***

For the Lockheed Martine Energy Systems, Inc.:
Robert M. Stivers, Esq., ***O'Neil, Parker & Williamson, Knoxville, Tennessee***

FINAL ORDER DISMISSING PETITION FOR REVIEW

BACKGROUND

This case arose when the complainant, Linda Gass, filed a complaint under the whistleblower protection provisions of a number of environmental statutes.[1] Gass alleged that the Department of Energy (DOE), two DOE employees, DOE's Inspector General, Lockheed Martin Corporation and Lockheed Martin Energy Systems, Inc. (LMES), retaliated against her when DOE employees destroyed information, which Gass subsequently sought through a Freedom of Information Act request because she needed it to prepare for a previously filed case.[2] The Occupational Safety and Health Administration (OSHA) determined that it did not have jurisdiction to investigate an alleged loss of potentially material evidence and that it lacked authority to investigate the alleged FOIA/Privacy Act violation. Gass filed a request for a hearing by a Department of Labor Administrative Law Judge (ALJ).

The ALJ scheduled a hearing and then cancelled it when DOE and LMES filed Motions for Summary Decision or Dismissal. Gass responded, opposing the motions. On November 20, 2002, the ALJ issued a Recommended Decision and Order – Approval of Motion to Dismiss LMES: Approval of Motion to Dismiss Mr. James Pugh; Approval of Motion to Dismiss Ms. Sandy Schneider; and Approval of Motion to Dismiss Doe (R. D. & O.). Attached to the R. D. & O. is the following "Notice:"

> This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.

R. D. & O. at 19.

Linda Gass has filed a "Protective Petition for Review" with the Administrative Review Board from the ALJ's November 20, 2002 R. D. & O. The Board received the

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[1] These statutes include: the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); and the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995).

[2] *Gass v. U.S. Dep't of Energy*, ARB No. 03-093, ALJ No. 2002-CAA-22 (ALJ April 29, 2003).

Protective Petition for Review by facsimile transmission on December 18, 2002. Counsel for Gass "notes" in the Petition, "[Complainant] did not receive the ALJ's decision until ten days ago [December 8, 2002] due to complications associated with USPS forwarding of mail and delivery of it to her by the management at her new address."

On December 23, 2003, the ALJ issued a Notice of Referral to Administrative Review Board – Complainant's December 20, 2002 Telefax Response. In the Notice the ALJ stated:

> On November 20, 2002, the [R. D. & O.] was mailed to the named parties and their counsel at the last known addresses. Specifically, a copy was sent to Mr. Slavin in Saint Augustine and Ms. Gass in Jacksonville, Florida. On December 20, 2002, by telefax, I received notice from the complainant, Ms. Gass, that her attorney, Mr. Slavin, intended to file and request a stay of the Recommended Decision and Order, pending resolution of another case involving Ms. Gass (200CAA22) that is pending before Administrative Law Judge Michael Lesniak. … Additionally, Ms. Gass explained that she had problems communicating with her counsel and receiving mail and messages at her new address in Jacksonville, Florida (which is the same address that appears on the Recommended Decision and Order service sheet). In closing Ms. Gass states "I am within 10 days of notification of this decision."

A copy of the Telefax from Gass was attached to the ALJ's Notice.

The regulations establishing the deadline for filing a timely petition for review provide:

> Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board ("the Board"), which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge, and shall be served on all parties and on the Chief Administrative Law Judge.

29 C.F.R. § 24.8(a). As provided in the regulations, to be effective, the Board must have received Gass's petition for review no later than December 5, 2002. On January 6, 2003,

LMES filed a Response to Complainant's Untimely Petition for Review. Lockheed averred:

> On its face, the Complainant's Petition must fail, as it both shows appropriate delivery of the Administrative Law Judge's Recommended Decision, and fails to assert a factual basis for the untimely filing. Initially, it must be noted that the service sheet for the Recommended Decision shows Service of Process on counsel for the Complainant at the same address as used by him on the face of the Petition for Review. … Further, the Petition does not even allege that the address shown in the Service Sheet for the Recommended Decision for the Complainant is incorrect, and certainly makes no assertions under oath of any failure of delivery, etc. The fact that an extra copy, sent as a courtesy to the Complainant, was not received by her is immaterial; the same was received by her attorney of record, and the time for review has passed.

Response of Lockheed Martin Energy Systems, Inc., to Complainant's Untimely Petition for Review at 2.

On January 10, 2003, the Board ordered Gass to show cause no later than January 24, 2003, why the Board should not dismiss the appeal because Gass has failed to file a timely petition for review. The Board permitted the Respondents to file a response no later than February 7, 2003.

Gass failed to file a timely response to the Show Cause Order. On January 29, Gass filed by facsimile, Complainant's Response to Show Cause Order, Motion to File *Instanter*, and Motion to File a Supplemental Brief. Gass stated, "The January 10, 2003 Order to Show Cause was received here by fax this morning from ARB, and leave is requested to file *instanter*, and to file a supplemental brief." Gass stated once again that her receipt of the R. D. & O. was "delayed through no fault of her own due to mail problems at her new residence. Ms. Gass did not receive the ALJ's RDO until December 8 due to complications associated with USPS forwarding of mail and delivery of it to her by the management at her new address." Finally, Gass concluded, "[I]f a declaration is required, leave is requested to get in touch with Ms. Gass after counsel's return from an out-of-town EEOC trial that commences tomorrow. Leave is requested to file a supplemental brief on the timeliness issue phrased by ARB." Complainant's Response to Show Cause Order, Motion to File *Instanter*, and Motion to File a Supplemental Brief at 1.

LMES replied to Gass's untimely response to the Board's Order to Show Cause, stating that it adopted its original response to the untimely petition and further noting, "Complainant continues to refuse to file documents within the time required by

regulation or Order, and offers no excuse for that failure." Reply of Lockheed Martin Energy Systems, Inc., to Complainant's Response to Show Cause Order at 1.

On February 11, 2003, the Board issued a second Show Cause Order, ordering Gass "to show cause no later than February 24, 2003, why her case should not be dismissed for her failure to timely reply to the Board's January 10, 2003 show cause order." Gass responded by facsimile on February 24, that her counsel was ill with the flu and had no recollection of seeing the Order to Show Cause until January 29, 2003, when he received a telephone call and facsimile copy of the Order from the Board. Attached to the response was Declaration from Nahum Litt stating that he spoke to Gass's counsel several times a day between January 15th and the 22nd and that he could tell that he was ill. While Gass reiterated her argument that her initial failure to timely file was not her fault, she did not dispute LMES's contention that even if Gass did not timely receive the R. D. & O., there is no indication that her counsel did not timely receive the R. D. & O. Complainant's Response to February 11 Show Cause Order, Motion to File *Instanter*, and Motion to File Supplemental Brief at 1.

LMES, in its reply to Gass's response, reiterated its earlier contentions that neither Gass's explanation of her failure to timely file a petition for review or to respond to the Board's initial show cause order were sufficient. Response of Lockheed Martin Energy Systems, Inc., to Complainant's Response of February 24, 2003.

Gass subsequently filed Complainant's Further Response to February 11 Show Cause Order and Motion to Take Notice of Animus. Gass noted that the Board had been unable to locate any USPS return receipt card for the January 10, 2003 Order to Show Cause and that this failure, "proves the veracity of Ms. Gass' response." Gass also asked the Board to take judicial notice of LMES's "animus in its February 28, 2003 filing." Complainant's Further Response to February 11 Show Cause Order and Motion to Take Notice of Animus at 1.

DOE replied that Gass had failed to establish why her untimely filings should be tolled under the principles of equitable tolling which the Board applies in determining whether to excuse untimely filing. DOE argued that even if it were true that the Board could not locate the certified mail receipt, "it is of no consequence, as the ARB's certificate of service indicates that the show cause order was mailed to complainant's attorney's proper address on January 10, 2003, and also to Complainant's proper address on that same date." Respondents' United States Department of Energy, et al. Response to Complainant's reply to the Administrative Review Board's Order to Show Cause at 4 n.3.

DISCUSSION

The regulation establishing a ten-day limitations period for filing a petition for review under the environmental whistleblower acts at issue here is an internal procedural rule adopted to expedite the administrative resolution of cases. 29 C.F.R. § 24.1(b)(2003). *Accord Hemingway v. Northeast Utilities,* ARB No. 00-074, ALJ Nos.

99-ERA-014, 015, slip op. at 3 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999). Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review. *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3; *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).

The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines. *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4; *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2. In *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. The court recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. at 20 (citation omitted). Gass's inability to satisfy one of these elements is not necessarily fatal to her claim, however courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'" *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984)(pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting tolling identifies a factor that might justify such tolling, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

Gass bears the burden of justifying the application of equitable tolling principles. *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). Gass has not alleged that the Respondents actively misled her or that she filed the precise statutory

claim in the wrong forum. Therefore, she must convince us that something extraordinary prevented her from timely filing her petition for review. However, her only defense is that her receipt of the decision was delayed "due to complications associated with USPS forwarding of mail[3] and delivery of it to her by the management at her new address." Complainant's Response to Show Cause Order, Motion to File *Instanter,* and Motion to File a Supplemental Brief. at 1. We find that Gass has failed to demonstrate an extraordinary event that precluded timely filing.

While Gass has averred that she did not timely receive the R. D. & O., the ALJ also served her counsel with the decision, and he has not disputed, much less established, that he failed to timely receive the decision. "Extraordinary circumstances" is a very high standard that is satisfied only in cases in which even the exercise of diligence would not have resulted in timely filing. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)("complete psychiatric disability" during the entirety of the limitations period); *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996) (incarceration in a foreign country for the entirety of the limitations period). "Extraordinary circumstances" does not extend to excusable neglect. *Irvin v. Dep't of Veterans Affairs,* 498 U.S. 89 at 96. And in any event, there was no evidence of excusable neglect here because Gass's counsel was timely served with the R. D. & O. and has offered no explanation for his failure to timely file the petition for review. *Accord Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 44 (3d Cir. 1976), *aff'd sub nom Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, (1977) (no excusable neglect in case in which clerk notified a party's attorney, rather than the party, and the attorney offered no explanation for having failed to file the petition for review within the allotted time).

While we recognize that Gass is not personally responsible for her counsel's failure to timely file the petition for review, as the Board recently held in *Dumaw v. International Brotherhood of Teamsters, Local 690,* ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug. 27, 2002):

> Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:
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> > Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly

[3] Technically speaking it was unnecessary for the Postal Service to "forward" the R. D. & O. because it was addressed to Gass at her current address.

> inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney." *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).[4]

Accordingly, finding that Gass did not timely file the petition and finding no grounds justifying equitable tolling of the limitations period, we **DISMISS** Gass's petition for review. [5]

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[4] The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

[5] Given our disposition of the case, the Board's January 10th Show Cause Order is moot.