



**In the Matter of:**

**LEE ROSEBERRY,**  
**COMPLAINANT,**  
**v.**

**ARB CASE NO. 06-046**  
**ALJ CASE NO. 05-WPC-04**  
**DATE: March 31, 2006**

**CITY OF PORTSMOUTH,**  
**NEW HAMPSHIRE,**  
**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

*Lee Roseberry, pro se, Portsmouth, New Hampshire*

*For the Respondent:*

*Thomas M. Clossom, Esq., Exeter, New Hampshire*

**FINAL DECISION AND ORDER  
DISMISSING PETITION FOR REVIEW**

The Complainant, Lee Roseberry, filed a complaint alleging that the Respondent, City of Portsmouth, New Hampshire, retaliated against him in violation of the whistleblower protection provisions of the Federal Water Pollution Control Act,<sup>1</sup> and its implementing regulations.<sup>2</sup> The issue before the Administrative Review Board is whether we should accept Roseberry's untimely-filed petition for review. As explained below, because Roseberry has failed to demonstrate exceptional circumstances that

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<sup>1</sup> 33 U.S.C.A. § 1367 (West 2001).

<sup>2</sup> 29 C.F.R. Part 24 (2005).

precluded him from timely filing his petition for review, we decline to accept his untimely-filed petition.

## BACKGROUND

On January 6, 2006, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he recommended that Roseberry's claim be dismissed. The R. D. & O. included this "Notice of Appeal Rights:"

To appeal, you must file a Petition for Review . . . that is received by the Administrative Review Board . . . within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. . . . If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).<sup>3]</sup>

This Notice summarizes the relevant regulation that provides:

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 . . . . , 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 . . . .<sup>4</sup>

The regulation provides that to be effective, a petition for review "must be received within 10 business days of the date of the decision of the administrative law judge." *See* 29 C.F.R. § 24.7(d). The Board has consistently interpreted the "must be received" requirement in the regulations governing the filing of petitions for review in the environmental whistleblower cases over which the Board has jurisdiction<sup>5</sup> literally - to be effective, the petition must be received within the period prescribed.<sup>6</sup> *See, e.g.,*

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<sup>3</sup> R. D. & O. at 7.

<sup>4</sup> 29 C.F.R. § 24.8(a).

<sup>5</sup> *See* 29 C.F.R. § 24.1(a) for a list of these statutes.

<sup>6</sup> In the environmental whistleblower cases this period is ten business days. 29 C.F.R. § 24.8(a).

*Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 2 (ARB Aug. 27, 2002); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, 4-5 (ARB Aug. 31, 2000). Given the regulation's plain language, there is simply no room to argue that any other time frame applies. The ALJ's decision was issued January 6. Roseberry's Petition for Review was received in the ARB on January 25, 2006, two business days after the required receipt date of January 23, 2006. The petition was untimely filed. Accordingly, on February 23, 2006, the Board issued an Order to Show Cause requiring Roseberry to demonstrate why the Board should not dismiss his appeal for failure to file a timely petition for review and permitting the City of Portsmouth, to reply to Roseberry's response.

### DISCUSSION

The regulation establishing a ten-business-day limitations period for filing a petition for review with the ARB is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes.<sup>7</sup> Therefore, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review.<sup>8</sup>

The Board is guided by the principles of equitable tolling in determining whether to relax the limitations period in a particular case.<sup>9</sup> Accordingly, the Board has 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.<sup>10]</sup>

But the Board has not determined that these categories are exclusive.<sup>11</sup> Roseberry's inability to satisfy one of these elements is not necessarily fatal to his claim but courts

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<sup>7</sup> 29 C.F.R. § 24.1. *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 Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999).

<sup>8</sup> *Gutierrez*, 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).

<sup>9</sup> *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

<sup>10</sup> *Gutierrez*, slip op. at 3-4.

<sup>11</sup> *Id.* at 3.

“have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”<sup>12</sup> 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.”<sup>13</sup>

Roseberry bears the burden of justifying the application of equitable tolling principles.<sup>14</sup> In response to the Order to Show Cause, Roseberry argues that he mailed “all copies of my request for review from Portsmouth’s Heritage Avenue Post Office on Wednesday, January 18, 2006...Believing that five days would be ample time for my letters to reach all parties, I mailed them in good faith.” Roseberry has not alleged that the City of Portsmouth actively misled him or that he filed the precise statutory claim in the wrong forum. His only defense is that the City of Portsmouth Post Office failed to deliver on time. However, Roseberry made no effort to determine whether the Post Office timely delivered the petition. If Roseberry had simply inquired of the Board whether the Board had received the document, he could easily have rectified the failure to deliver by simply faxing a copy of the petition.<sup>15</sup> The failure to inquire of the Board whether the document had been delivered when the preservation of Roseberry’s right to appeal was dependent upon timely receipt is evidence of a lack of due diligence.

In any event, the Post Office’s failure to deliver does not constitute an **extraordinary** event that precluded the timely filing. What precluded the timely filing was Roseberry’s failure to make a simple phone call to determine if the Board had received his petition.

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<sup>12</sup> *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).

<sup>13</sup> *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

<sup>14</sup> *Accord Wilson*, 65 F.3d at 404 (complaining partying Title VII case bears burden of establishing entitlement to equitable tolling).

<sup>15</sup> *Cf. Wilson*, 65 F.3d at 405 (party who unsuccessfully argued that she was entitled to equitable tolling because her filing was delayed due to overseas mail, failed to explain why she could not have used telephone or facsimile).

## **CONCLUSION**

We find that Roseberry did not timely file the petition and that there are no grounds to justify equitable tolling of the limitations period. Accordingly, we **DISMISS** Roseberry's petition for review.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**