

# **Janet Krell v. U.S. Government Accountability Office**

**Docket No. 07-01**

**Date of Decision: July 13, 2007**

**Cite as: Krell v. GAO, No. 07-01 (7/13/07)**

**Before: Steven H. Svartz, Administrative Judge**

## **Headnotes:**

**Good Cause**

**Harmful error**

**Limitations Period**

**Timeliness of Complaint**

## **MEMORANDUM AND ORDER ON REQUEST FOR RECONSIDERATION**

On May 29, 2007, the undersigned Administrative Judge issued an Order dismissing a Petition that private counsel attempted to file with the Personnel Appeals Board (PAB or the Board) by facsimile on May 22, 2007, on behalf of Petitioner Janet Krell. The Petition, due on April 23, 2007, was deemed to be untimely and not submitted in a manner authorized by regulation. The matter was dismissed for failure to comply with the Board's filing requirements.

On June 8, 2007, Petitioner's private counsel timely filed, by mail, a Request for Reconsideration, arguing that Board precedent and its regulations provide for the waiver of a filing deadline for good cause shown; that both the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC) accept filings originally sent to improper locations; that Petitioner's private counsel believed that the Petition was properly filed with the Board; and that the filing error was harmless.

On July 2, 2007, the Agency timely filed a Response to Petitioner's Request for Reconsideration, asking the Board to affirm its Order dismissing the Petition. In its Response, the Agency points out that Petitioner's private counsel failed to follow the Board's requirements for filing a Petition with respect to both timing and method of submitting the Petition, and further argues that private counsel failed to establish good cause for failure to do so. Moreover, the Agency notes that discovery is well underway in the matter filed by PAB/OGC, and that requiring it to defend against two Petitions in this matter "appears unwarranted and prejudicial." Response at 5. On

July 11, 2007, Petitioner's private counsel filed a Reply to the Agency's Response. The Reply "reiterates" Petitioner's "request that PAB accept her Petition."<sup>1</sup> Reply at 1.

For the reasons set forth below, the Request for Reconsideration of the Order dismissing the matter is denied.

### Background

On October 12, 2006, Petitioner Janet Krell filed a Charge, and on October 14 an amended Charge, with the Board's Office of General Counsel (PAB/OGC) alleging that the Government Accountability Office (GAO) discriminated against her on the basis of disability, retaliated against her for engaging in protected activity, and violated certain statutory rights. PAB/OGC investigated Ms. Krell's allegations and, on March 16, 2007, General Counsel Anne M. Wagner sent a Right to Petition letter to Ms. Krell's designated representative, Katherine Atkinson, an attorney with the Law Offices of Gary M. Gilbert. In that letter, Ms. Wagner stated that the PAB/OGC investigation had revealed reasonable grounds to believe that Ms. Krell's rights under the GAO Personnel Act (GAOPA), 31 U.S.C. §731 *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, had been violated and she offered to represent Ms. Krell in proceedings before the Board. To effect that representation, Ms. Wagner enclosed an Offer of Representation form with her letter; she also included a Statement of Investigation and a Summary of Procedures for Filing a Petition with the GAO Personnel Appeals Board.

In the same letter, Ms. Wagner informed Ms. Atkinson that her client had the right to decline the PAB/OGC's offer of representation and to pursue her claims either *pro se* or with a representative of her choosing. Ms. Wagner's letter provided additional, specific information about the process for pursuing a claim before the Board in the event that Ms. Krell were to decline the PAB/OGC's offer of representation:

If that is the case, then your client or her chosen representative must file a Petition with the PAB within 30 calendar days after your receipt of this letter. Failure to timely file a Petition is grounds for dismissal. Furthermore, in filing such a Petition, your client must adhere to the procedures found at 4 C.F.R. §28.18 and described in the enclosed summary. These and other rules governing the appeal process at the PAB can be downloaded from the Board's website at [www.pab.gao.gov](http://www.pab.gao.gov).

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<sup>1</sup> The Reply was not accompanied by a motion for leave to file, as required by the Board's regulations. See 4 C.F.R. §28.21(b)(4). As such, it is not properly before the Board. However, even considering the arguments set forth therein, nothing in the submission changes the conclusion set forth below.

If you have any questions regarding this matter, please call me or Frank Mack at (202) 512-7507, email me at [wagnera@gao.gov](mailto:wagnera@gao.gov), or email Mr. Mack at [mackf@gao.gov](mailto:mackf@gao.gov).

Ms. Wagner's letter was sent "return receipt requested" and was delivered to the Law Offices of Gary M. Gilbert on March 23, 2007; the return receipt was delivered to the PAB/OGC on March 26, 2007.

Under Board regulations, a Petition must be filed "within 30 days after receipt by the charging party of the Right to Petition Letter from the Board's Office of General Counsel." 4 C.F.R. §28.18(b)(1). Pursuant to the Board's regulations, PAB General Counsel Anne Wagner and Frank J. Mack, a PAB/OGC Senior Trial Attorney, timely filed by hand delivery on April 20, 2007 an original Petition and three copies with the Personnel Appeals Board on behalf of Ms. Krell. *See* 4 C.F.R. §28.20(a). The Petition alleged that GAO managers and officials discriminated and retaliated against Ms. Krell in violation of the Americans with Disabilities Act and committed prohibited personnel practices with respect to Ms. Krell in violation of the GAOPA.

The PAB/OGC attorneys served a courtesy copy of the Petition, by hand delivery, on GAO's representatives, Joan Hollenbach, Managing Associate General Counsel in the Legal Services Division of GAO's Office of General Counsel, and Sara Cytron, Senior Attorney in the Legal Services Division of GAO's Office of General Counsel. The courtesy copy of the Petition was delivered to GAO's Office of General Counsel, which is located in Room 7838 of the GAO headquarters building at 441 G Street, NW in Washington, D.C. The Petition included a Certificate of Service which stated that "a copy of the foregoing Petition for Review was served" on the two individuals in GAO's Legal Services Division. (Emphasis added).

The Board's procedural regulations specifically provide that the Board will serve a copy of a Petition upon the parties, attaching a Service List indicating the names and addresses of the parties or designated representatives. 4 C.F.R. §28.20(b). Consistent with this regulation, the Clerk of the Board, upon receiving the Petition filed by PAB/OGC on April 20, 2007, sent a Notice acknowledging the filing of the Petition to the parties, Ms. Wagner and Mr. Mack for the Petitioner, and Ms. Hollenbach and Ms. Cytron for the Respondent. The Notice informed the parties that, pursuant to the Board's regulations (4 C.F.R. §28.42), the discovery process was to commence immediately and would run for 65 days, with all discovery requests to be served within 30 days.

On May 10, 2007, the Agency, through counsel, timely filed Respondent's Answer to Petition and served a copy, via messenger, on Ms. Krell's representatives, Ms. Wagner and Mr. Mack.

On May 17, 2007, the Clerk of the Board sent a Scheduling Notice to the PAB/OGC as attorneys of record for Petitioner and to the attorneys for the Agency setting a status conference date for the case on June 4, 2007.

On May 21, 2007, at 7:51 p.m., Katherine Atkinson, private counsel retained by Ms. Krell, transmitted a Petition to the Board by facsimile. The Petition was logged in at the Board's office on the morning of May 22, 2007. Accompanying the Petition was a cover sheet from Ms. Atkinson stating the following:

We served this improperly on April 23, 2007 (see attached certificate of service), because we used the same Certificate of Service PAB/OGC used when filing their Petition for Ms. Krell, not realizing they were not including PAB on the certificate of service. I apologize for our error and hope you will consider Ms. Krell's Petition timely filed.

The cover sheet also included a notation that a hard copy of the transmitted document "will not follow." This submission did not include any motion to file out of time or other formal request, nor did it contain any affidavit or other support for accepting the untimely submission.

The May 22 Petition alleged that GAO managers discriminated and retaliated against Ms. Krell in violation of the ADA and incorporated the facts as stated in the Petition filed by PAB/OGC on April 20 on behalf of Ms. Krell. The May 22 Petition included a challenge to a 10-day suspension, which the PAB/OGC Petition did not.

On May 29, 2007, the undersigned Administrative Judge issued an Order dismissing the Petition submitted by facsimile on May 22, 2007 for failure to comply with PAB filing requirements as set forth in the Board's regulations.<sup>2</sup>

On June 4, 2007, at the status conference held by the undersigned Administrative Judge with counsel from the PAB/OGC and GAO, deadlines were established for dispositive motions and pre-hearing submissions, and the evidentiary hearing was scheduled.

On June 8, 2007, private counsel timely filed, by mail, an original and three copies of a Request for Reconsideration of the Order dismissing the Petition.

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<sup>2</sup> The Order also stated that "[n]othing in the PAB's regulations suggests that if an individual has elected representation by the PAB/OGC and the PAB/OGC has filed a timely Petition on behalf of the individual, the individual can also file another Petition involving the same matter. To the contrary, allowing a second filing would appear to be inconsistent with the concept of an election set forth in the PAB's regulations and could present administrative difficulties." In this regard, the Order noted that, although Board regulations allow the charging party to retain a private representative even if he or she has elected to be represented by the General Counsel, the role of that representative is "limited to assisting the General Counsel as the General Counsel determines to be appropriate." 4 C.F.R. §28.12(e). When this provision was added to the Board's regulations, the Board explained in the supplementary statement published in the Federal Register that "when the General Counsel participates in a case, the General Counsel shall be lead counsel." 51 Fed. Reg. 7735 (Mar. 6, 1986) (emphasis added).

## Good Cause

As the Supreme Court recently noted, procedural time limits may be adjusted by the administrative forum when they are limits set for processing purposes and not by statute. *See Bowles v. Russell*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2360, 2364-65 (2007). In this instance, the PAB has defined the circumstance for the exercise of such discretion as a showing of “good cause.” 4 C.F.R. §28.4(c). *See also* 4 C.F.R. §28.16(b) (The Board’s regulations allow an administrative judge to “waive a Board regulation in an individual case for good cause shown if application of the regulation is not required by statute.”); *Quarry v. GAO* (10/13/81) and (12/21/81) (reconsideration).

Both the MSPB and the EEOC have similar provisions in their regulations. 5 C.F.R. §1201.22(c); 29 C.F.R. §1614.604. The seminal MSPB case on the issue notes that the presiding official has “wide discretion” in deciding whether a party has shown that “due diligence or ordinary prudence” has been exercised under the particular circumstances of the case. *Alonzo v. Department of Air Force*, 4 M.S.P.R. 180, 184 (1980). In reviewing an MSPB decision on the waiver of a time limit for appeal, the U.S. Court of Appeals for the Federal Circuit noted that “[g]ood cause for an untimely filing is a question of fact which must be proven by the petitioner; whereas, a waiver of the time limit for an appeal is a matter of grace which the Board grants or denies, in the interest of justice, and in the exercise of its discretion, considering all the facts and circumstances of the case.” *Shiflett v. U.S. Postal Service*, 839 F.2d 669, 672-73 (Fed. Cir. 1988).

In subsequent decisions, the MSPB has refined the criteria it uses to determine whether an appellant has shown good cause for untimely filing. Among the factors that the MSPB considers are the length of the delay; the reasonableness of the excuse as it relates to the due diligence exercised; whether the appellant is proceeding *pro se*; and whether there is evidence of the existence of circumstances beyond appellant’s control that affected his or her ability to comply with the time limits. *Helmstetter v. Department of Homeland Security*, \_\_\_ M.S.P.R. \_\_\_ (June 7, 2007); *Moorman v. Department of Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff’d*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

Applying each of the *Helmstetter* criteria to the instant situation, it is clear that Petitioner’s private counsel have not established “good cause” warranting waiver of the 30-day time limit for the filing of a Petition. In order to be timely filed, Board regulations required that the Petition in this case be delivered by hand to the Board’s office before 4:00 p.m. on April 23, 2007, or postmarked no later than that same date. 4 C.F.R. §28.18(c)(1) and (2); 4 C.F.R. §28.4(d). The Petition filed by private counsel was transmitted by facsimile during evening hours on May 21, 2007 and received by the Board on May 22, a full month after it was due. Although the Federal Circuit has cautioned the MSPB to waive its timeliness requirements more frequently when delays are of a minimal nature, it also makes clear that it is speaking of delays of one or two days, which the Court characterizes as sometimes indicative of the absence of negligence. *Walls v. MSPB*, 29 F.3d 1578, 1582 (Fed. Cir. 1994) (*pro se* status, inadequate notice and minimal

delay combined to establish good cause for untimely filing). The one-month delay in filing in this case does not support a finding of good cause.

The second criterion requires that the reasonableness of the excuse for late filing relate to the due diligence exercised in the attempt to file in a timely fashion. In this case, Petitioner's private counsel failed to follow clear filing instructions provided in a Right to Petition letter sent by the PAB/OGC on March 16, 2007. Despite having been specifically directed to both the Board's regulations and its web site and despite having been provided with a summary of Board procedures as well as telephone and e-mail contact information, counsel simply served the opposing party's representative in lieu of filing the Petition with the proper adjudicatory body. Failure to ascertain the Board's correct address, which appears in its regulations at 4 C.F.R. §28.18(c)(2), does not amount to adequate diligence. Moreover, the failure to follow explicit filing instructions does not constitute good cause for a delay. *Sanford v. Department of Defense*, 61 M.S.P.R. 207, 209 (1994). Accordingly, application of the second criterion in this case does not support a finding of good cause.

The third criterion relates to the Petitioner's status as either *pro se* or represented. The MSPB has, over the years, given increased latitude to *pro se* appellants as they have to deal with numerous timeliness, filing, and forum selection issues. The Personnel Appeals Board has also seen a number of *pro se* litigants bring cases and, to assist them as well as all practitioners, prepared a *Guide to Practice*, which is available on the Board's web site. The *Guide* reiterates the filing instructions contained in the Summary of Procedures supplied to private counsel and in the regulations cited in the Right to Petition letter. In addition, the PAB's regulations invite inquiries of a technical or procedural nature from parties. 4 C.F.R. §28.146(a). In this case, Petitioner was, at every stage, represented by two attorneys who, according to their firm's web site, specialize in representing employees and employers in all areas of EEO administrative practice.<sup>3</sup> As such, the fact that Petitioner was represented by two attorneys with experience in this area, rather than acting *pro se*, does not support a finding of good cause in this case.

Finally, the MSPB will consider evidence of the existence of circumstances beyond a petitioner's control that may have affected his or her ability to comply with the time limits. The Request for Reconsideration presents no such evidence. Therefore, application of this criterion does not support a finding of good cause.

Accordingly, considering the month-long period between the inapt service on GAO's Office of General Counsel and the attempted filing at the Board by facsimile, the failure by private counsel to exercise due diligence by following clear instructions, the fact that Petitioner was not at any stage in the proceeding acting *pro se*, and the absence of circumstances beyond private counsel's

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<sup>3</sup> See [www.ggilbertlaw.com](http://www.ggilbertlaw.com). In addition, Attorney Gilbert, who signed the Petition in question, has significant experience in administrative law as it relates to employment discrimination. In an affidavit he filed with the Request for Reconsideration, he points to his five years of experience as an administrative judge and eleven years as Chief Administrative Judge at the EEOC. Request, Ex. 2.

control, I find that good cause for the granting of a waiver of the time requirements has not been established.

### Improper Service

In asking that her improper service be accepted as timely, private counsel points out that the MSPB accepts appeals that would otherwise be timely but were improperly filed with the wrong agency. Request at 3 (citing *Maggard v. OPM*, 102 M.S.P.R. 75, 78 (2006); *Killian v. OPM*, 100 M.S.P.R. 583, 585 (2005)). While the cases cited by counsel support that proposition generally, they both contain specific limitations to the exception and are not germane to the instant case. The appellants in both *Maggard* and *Killian* did not have representation, a status that has caused the MSPB to hold repeatedly, as it did in those cases, that a *pro se* appellant will not be denied an opportunity to have a case heard where the record indicates a clear intent on the part of an appellant, acting *pro se*, to file an appeal within the Board's time limits and the agency was not unduly prejudiced. *Gosse v. OPM*, 86 M.S.P.R. 566, 569 (2000); *Hemphill v. OPM*, 77 M.S.P.R. 508, 511 (1998); see *Small v. Department of Navy*, 6 M.S.P.R. 366, 368 (1981) ("counsel had an affirmative duty as a member of the bar to be cognizant of all provisions of law affecting his client's rights"). Counsel also cites to a case in which appellant received misinformation about his appeal rights. Request at 3 (citing *Moore v. Department of Commerce*, 55 M.S.P.R. 451, 455-57 (1992)). That case clearly is inapposite here, as private counsel was given unambiguous information about how to file a Petition with the Board, in writing, and specifically directed to the applicable Board regulations on filing.

In furtherance of the argument concerning improper service, private counsel also points to authority for the proposition that the MSPB recognizes timely service on other bodies as timely service on the MSPB. The cases cited by counsel, and generally on this question, pertain to instances in which there are issues appealable to the MSPB as well as discrimination claims within the same charge. As noted by Petitioner's private counsel, 5 U.S.C. §7702(f) requires the MSPB to accept filings as timely in "mixed cases" when they were timely filed with another agency. *Miller v. Department of the Army*, 987 F.2d 1552, 1555-56 (Fed. Cir. 1993). Because the PAB performs the functions of both the MSPB and the EEOC, the confusion that frequently surrounds the selection of a forum in mixed cases (and was a basis for enactment of 5 U.S.C. §7702(f)) is not at issue in matters before the Board.

In each of the cases relied upon by counsel, the appellants were either proceeding without representation, misinformed about appeal rights, or confused by the forum selection unique to mixed cases. The cases are clearly distinguishable from the instant circumstances in which Petitioner was represented by private counsel who had been properly directed, in writing, to the correct section of the Board's regulations governing the filing of petitions.

Counsel also proffers a line of EEOC cases which note that the receiving agency need only forward an improperly filed appeal to the appropriate administrative body in order for it to be considered timely. Request at 4. However, other EEOC cases hold to the contrary. See *Brady v.*

*U.S. Postal Service*, App. No. 01952326 (July 31, 1997), 1997 EEOPUB LEXIS 2421 (“The Commission has held that where proper appeal rights have been given, an appeal is untimely filed where the appeal is mailed to the wrong office, even if it would have been timely filed if mailed directly to the Commission”). See also, *Henry v. Department of Veterans Affairs*, Req. No. 05901116 (Nov. 30, 1990), 1990 WL 113298 (EEOC). In this case, GAO’s Office of General Counsel was the recipient of what appeared to be a courtesy copy of a Petition.

Accordingly, private counsel’s contentions fail to establish “good cause” warranting waiver of the applicable service requirements in this case.

### Counsel Believed the Filing was Timely and Proper

In further support of the argument that the original Petition was timely filed, Petitioner’s private counsel both submitted affidavits with the Request for Reconsideration. In his affidavit, Mr. Gilbert, senior attorney in the Law Offices of Gary M. Gilbert, states that the original Petition was filed at 441 G Street, N.W., Room 7838, Washington, D.C. 20548 and that he believed that Ms. Atkinson had filed the Petition in a manner “consistent with the Agency’s regulations for submissions of petitions before the Board.” There is neither a GAO order nor a Board regulation that allows or directs Board Petitions to be filed at an address that references Room 7838 in the GAO headquarters building.

As stated in the May 29, 2007 Order, the Board’s regulations specify how and where to file a Petition. Counsel was directed to 4 C.F.R. §28.18, *Filing a Petition with the Board*, in the March 16 Right to Petition letter sent to Ms. Atkinson by PAB/OGC. That section of the Board’s regulations states that the Personnel Appeals Board is physically located in Suite 560, Union Center Plaza II, 820 First Street, NE, Washington, DC 20002; filing is permitted at that address by hand delivery or by mail. 4 C.F.R. §28.18(c)(1).<sup>4</sup>

Ms. Atkinson also filed an Affidavit in which she stated that she believed that she “served the Petition properly on both the Board and opposing counsel.”<sup>5</sup> She further stated that she “understood the first person on the Certificate of Service was the appropriate person at the Board.” The Petition that Ms. Atkinson served was addressed to two attorneys at the same address who work in the Legal Services Division of GAO’s Office of General Counsel. There was no apparent attempt by Ms. Atkinson to direct the Petition to the Personnel Appeals Board, a

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<sup>4</sup> In the alternative, the Board’s regulations allow filing by mail through GAO. Mail sent via the GAO mailroom must be addressed to the Board at Suite 560, Union Center Plaza II, 441 G Street, NW, Washington, DC 20548. 4 C.F.R. §28.18(c)(2) (emphasis added).

<sup>5</sup> There is a difference between “filing” and “serving” a document. A filing places a document in the custody of a court or other adjudicatory body and constitutes an official record; service officially notifies a party of an action or proceeding. In this case, Ms. Atkinson’s service on opposing counsel did not place a document in the custody of the Personnel Appeals Board.

separate, independent entity with its own set of regulations that functions as the adjudicatory body for GAO and is located in a different building.

The Board's regulations, which were referenced in the March 16 Right to Petition letter, clearly state that petitions are to be addressed to the Personnel Appeals Board, not to any individual attorney. 4 C.F.R. §28.18(c)(2). If Ms. Atkinson had any question about the affiliation of either Ms. Hollenbach or Ms. Cytron, she could have sought information from either Mr. Mack or Ms. Wagner or she could have accessed the Board's web site, which contains a link on the opening page of the site identifying those persons who make up the Board staff. Both the contact information for Ms. Wagner and Mr. Mack and the address for the Board's web site were provided to Ms. Atkinson in the March 16 letter.

Petitioner's private counsel maintain that the Petition was properly filed, albeit with the wrong agency, and therefore was merely improperly served. After discovering the original filing error, counsel attempted to rectify the mistake by filing a Petition with the Board. While acknowledging that an error had occurred, counsel nonetheless still failed to follow Board regulations for filing a Petition and, instead, submitted a Petition, by facsimile, after the conclusion of the Board's business hours. Additionally, the cover sheet for the faxed Petition indicated that no hard copy of the Petition would follow. Board regulations require the filing of an original and three copies of a Petition by 4:00 p.m. on the due date, by mail or by hand delivery, and by no other means. 4 C.F.R. §§28.18(c)(1), 28.21(b)(4). Accordingly, private counsel's arguments in this regard do not establish that the Petition was properly filed.

#### Harmless Error

As discussed above, counsel has failed to establish good cause for a waiver of the filing deadline based upon consideration of the traditional factors for invoking the discretion of an administrative judge in this manner. Because of this failure to comply with the regulatory standard of good cause, I need not reach the argument that the untimely filing with the Board constituted harmless error and therefore the Petition should be accepted. Nonetheless, the circumstances of this case suggest that principles of judicial economy warrant a review of the argument. On review, I find that this argument does not warrant acceptance of the Petition.

Counsel maintains that any error made in filing was harmless because Respondent received the Petition in a timely manner. In this instance, PAB/OGC had timely filed a Petition on behalf of Ms. Krell on April 20, 2007. Subsequently, the Board sent a Notice of the filing of the Petition to the parties. The Notice also informed the parties that the discovery process commenced immediately and would run for 65 days, with all discovery requests to be served within 30 days. Although GAO had a copy of the Petition that private counsel served, it did not have a formal Notice from the Board that a second matter involving Ms. Krell had been filed with, or accepted by, the Board on or about April 23, 2007. Absent such Notice, GAO had no obligation to start the discovery process, to engage in any pre-hearing processes, or to take any other action with

respect to the Petition provided to its Legal Services Division by Petitioner's private counsel. 4 C.F.R. §§28.20(b), 28.42(d)(5). The Petition properly filed by PAB/OGC on behalf of Ms. Krell is proceeding apace, with deadlines established for discovery, dispositive motions, and pre-hearing submissions and a hearing date set. Disrupting that process would prejudice the Agency. Accordingly, private counsel's contention that the untimely filing constituted harmless error is rejected.

### **Conclusion**

Petitioner's private counsel has not established good cause for failure to follow the clear written instructions contained in the PAB General Counsel's Right to Petition letter of March 16 or to exercise due diligence and ordinary prudence in accessing and adhering to the Board's regulations.

The Request for Reconsideration is denied.

**SO ORDERED.**