

Janet Krell v. U.S. Government Accountability Office

Docket No. 07-01

Date of Decision: September 4, 2007

Cite as: Krell v. GAO, No. 07-01 (9/4/07)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Filing of a Petition

Good Cause

Interlocutory Appeals

Motions Practice

PAB General Counsel

PAB Regulations

MEMORANDUM AND ORDER ON MOTION FOR CERTIFICATION TO THE BOARD OF AN INTERLOCUTORY RULING

I. INTRODUCTION

On July 24, 2007, Petitioner's private counsel¹ timely filed a Motion seeking certification to the Personnel Appeals Board (PAB or Board) of an interlocutory appeal of: (1) a May 29, 2007 Order issued by the undersigned Administrative Judge dismissing the Petition filed by private counsel and (2) a July 13, 2007 Memorandum and Order, also issued by the undersigned Administrative Judge, denying private counsel's Request for Reconsideration of the May 29 Order. On August 6, 2007, Respondent Government Accountability Office (GAO or the Agency) timely filed a Response requesting that the Motion for Certification be denied. For the reasons set forth below, the Motion is denied.

¹ Petitioner's private counsel are Gary Gilbert and Katherine Atkinson, both of whom signed the Petition and the Motion for Certification here at issue. The Request for Reconsideration of the Order dismissing the Petition was filed by Ms. Atkinson alone. Unless otherwise specified or made clear by the context, the term "private counsel" in this Memorandum and Order refers to both Mr. Gilbert and Ms. Atkinson.

A. BACKGROUND²

1. Events up to May 22, 2007

On October 12, 2006, Petitioner Janet Krell filed a Charge, and on October 14 an amended Charge,³ 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 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.

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

Right to Petition Letter at 2.

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.

² This background is set forth in the July 13 Memorandum and Order. It is repeated here for the convenience of the reader.

³ The Right to Petition letter cites the date of the amended Charge as October 14, 2006, while GAO's Answer to the Petition refers to date of the amended Charge as November 14, 2006. The actual Charge and Amended Charge are not part of the record before the Personnel Appeals Board.

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 M. 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 Petition included a Certificate of Service which shows that the PAB/OGC attorneys served a courtesy copy of the Petition, by hand delivery, on GAO’s representatives, Joan M. Hollenbach, Managing Associate General Counsel in the Legal Services Division of GAO’s Office of General Counsel, and Sara Cytron, a 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 Certificate of Service stated that “a copy of the foregoing Petition for Review was served” on the two individuals in GAO’s Legal Services Division (emphasis added). There was no reference to the Personnel Appeals Board on the Certificate.

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 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 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

⁴ The filing party must serve all other pleadings on the opposing party at the time the pleading is filed with the Board. 4 C.F.R. §28.20(b)(2).

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.

2. The May 29 Order

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. The Order noted that 4 C.F.R. §28.18(b)(1) makes clear that a Petition must be filed with the Board within 30 days of receipt of a Right to Petition Letter. Additionally, the Order also stated that the regulation further specifies how and where to file a Petition—*i.e.*, either (1) by hand delivery to the PAB offices at Suite 560, Union Center Plaza II, 820 First Street, NE, Washington, DC 20002; or (2) by mail addressed to the PAB, Suite 560, Union Center Plaza II, 441 G Street, NW, Washington, DC 20548—and that there is no provision authorizing the filing of a Petition by facsimile submission.

After noting that, in order to be timely filed, a Petition was due to be delivered by hand or postmarked no later than April 23, 2007, the Order stated:

Counsel's attempt to file a Petition on behalf of Ms. Krell through the May 22, 2007 facsimile submission to the PAB does not comply with the PAB's regulations either as to when to file a Petition or how to file a Petition. *See* 4 C.F.R. §28.18(b)(1) and (c). As stated above, in order to be timely filed, a Petition was due to be delivered by hand or postmarked no later than April 23, 2007. The May 22 facsimile submission was received by the PAB considerably after the deadline for filing a Petition in this matter, and as such is untimely. Moreover, the May 22 facsimile submission does not comply with either of the only two methods authorized by 4 C.F.R. §28.18(c) for filing a Petition—that is, either by hand delivery or by mail.

The Board's regulations provide that "[e]xcept as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified period of time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Board or the administrative judge." 4 C.F.R. §28.4(c). As set forth above, the Right to Petition letter advised counsel of the pertinent PAB regulations for filing a Petition, and additionally advised counsel of the filing deadline and the consequence of untimely filing. Nothing in counsel's

faxed submission of May 22 establishes good cause for granting an exception to the regulatory requirements in 4 C.F.R. §28.18.

May 29 Order at 3-4.

The Order then dismissed the Petition submitted by facsimile on May 22, 2007 “for failure to comply with the PAB’s requirements,” and included the following footnote:

As noted above, the PAB/OGC timely filed a Petition on Ms. Krell’s behalf. Nothing in this Order affects the Petition filed by PAB/OGC. Additionally, I note that, consistent with the PAB’s regulations (4 C.F.R. 28.12(d)), the PAB/OGC’s Right to Petition Letter dated March 16, 2007, provided Ms. Krell with an option: if she timely elected representation by the PAB/OGC, the PAB/OGC would file a Petition on her behalf in accordance with its findings and would continue to represent her throughout the proceeding; on the other hand, if she declined the PAB/OGC’s offer, she could pursue her claims either *pro se* or with a representative of her choosing. Ms. Krell elected representation by the PAB/OGC, as evidenced by the timely filing of a Petition by the PAB/OGC on her behalf.

Nothing 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. Indeed, 4 C.F.R. §28.12(e) provides that a charging party may retain private counsel in a limited role to assist the General Counsel as appropriate when representation by PAB/OGC is elected. Accordingly, 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. *However, in light of the procedural deficiencies in the May 22 facsimile submission, I need not resolve: (1) whether the Petition submitted by Ms. Krell’s private counsel involved the same matter as the Petition filed by the PAB/OGC; or (2) whether the Petition submitted by Ms. Krell’s private counsel would have been considered properly before the PAB even if it had been timely filed in accordance with the PAB’s procedural requirements.*

May 29 Order at 4 n.3 (emphasis added).

3. Events Following the May 29 Order

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 May 29 Order dismissing the Petition. On July 2, 2007, GAO filed a Response seeking denial of the Request for Reconsideration. On July 11, 2007, private counsel filed a reply to GAO’s Response.

4. The July 13 Order

The July 13 Order denied the Request for Reconsideration, finding that “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.” July 13 Order at 15. In determining that private counsel had not established good cause, the July 13 Order considered the length of the delay in filing; the reasonableness of the excuse as it related to the due diligence exercised; whether Petitioner was proceeding *pro se*; and whether there was evidence of the existence of circumstances beyond Petitioner’s control that affected her ability to comply with the time limits.

As to the first criterion set forth above, the Order found that the Petition filed by private counsel was received by the Board a full month after it was due, considerably in excess of the delays of one or two days which the Federal Circuit characterizes as sometimes indicative of the absence of negligence. Accordingly, the Order found that the one-month delay in filing in this case did not support a finding of good cause. July 13 Order at 8.

As to the second criterion, which 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, the Order found that 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. In this regard, the Order stated:

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.

Id. at 8.

The third criterion relates to the Petitioner’s status as either *pro se* or represented. After noting that the PAB has prepared a *Guide to Practice*, which is available on the Board’s web site, to assist *pro se* litigants as well as all practitioners, and that the *Guide* reiterates the filing instructions contained in the Summary of Procedures supplied to Ms. Atkinson and in the regulations cited in the Right to Petition letter, the Order stated:

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. 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.

Id. at 9 (footnote referencing Mr. Gilbert's experience omitted).

As to the fourth criterion, the Order noted that private counsel's Request for Reconsideration presented no evidence of the existence of circumstances beyond Petitioner's control that may have affected counsel's ability to comply with the time limits, and found that application of this criterion does not support a finding of good cause.

In conclusion as to timeliness of filing, the Order stated:

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

Id. at 9-10.

The Order also rejected private counsel's argument that her improper service should be accepted as a timely filing. The Order distinguished MSPB cases cited by private counsel, noting that 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 Order stated that those cases were 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. The Order also stated that although private counsel had proffered 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, other EEOC cases hold to the contrary. Accordingly, the Order found that private counsel's contentions failed to establish "good cause" warranting waiver of the applicable service requirements in this case. *Id.* at 11-12.

Next, the Order addressed the argument that private counsel had believed that their Petition had been timely filed. The Order found that that private counsel's argument in this regard did not establish that the Petition was properly filed. *Id.* at 12-14.

Finally, the Order stated that because private counsel had failed to comply with the regulatory standard of good cause for a waiver of the filing deadline based upon consideration of the pertinent factors for invoking the discretion of an administrative judge in this manner, there was no need to reach the argument that the untimely filing with the Board constituted harmless error and therefore the Petition should be accepted. Nonetheless, finding that the circumstances of this case suggested that principles of judicial economy warranted a review of the argument, the Order concluded that this argument did not warrant acceptance of the Petition. The Order noted that the Petition properly filed by PAB/OGC on behalf of Ms. Krell was proceeding apace, with deadlines established for discovery, dispositive motions, and pre-hearing submissions and a

hearing date set, and that disrupting that process would prejudice the Agency. Accordingly, private counsel's contention that the untimely filing constituted harmless error was rejected. *Id.* at 14-15.

In conclusion, the Order found that private counsel had not established good cause for failure to follow the clear written instructions contained in Ms. Wagner'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, and denied the Request for Reconsideration.

B. PETITIONER'S MOTION FOR CERTIFICATION

In the Motion for Certification of an interlocutory appeal, private counsel contend that "Petitioner's case raises several issues which are appropriate for review by the entire Board." Motion at 1. Specifically, the Motion identifies these issues as follows:

First, whether Petitioner satisfied the filing requirements by sending the Petition by facsimile is an important question of law and policy about which there is substantial difference of opinion, and Petitioner will be unduly harmed if the Board does not consider the issue at this time. Second, the Administrative Judge's two Orders convey confusion about the Board regulations regarding a petitioner's election to have representation by the Office of General Counsel and/or private counsel. This is a crucial issue of law because it may leave Petitioner, and others like her, without recourse on certain of her complaints against the Agency if the Board agrees with the AJ. Third, the first two issues as well as the Board's implementation of a finding of "good cause" bear directly on whether the Board should accept Petitioner's Petition; and if the Board does not consider the issue at this time, Petitioner will be subjected to undue harm given that her Petition will not be heard.

Motion at 1-2. Private counsel's arguments with respect to each of these three issues are set forth more fully below.

1. Filing by Facsimile

Private counsel contend that the PAB's "regulation requiring filing by U.S. mail or hand-delivery is out-dated and penalizes petitioners represented by private counsel because private attorneys cannot hand-deliver filings and U.S. Mail takes several days to arrive." Motion at 4. Private counsel state that the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB) accept appeals filed by facsimile pursuant to their regulations, and assert that the PAB "should update its regulations to permit Petitioners to file by facsimile." *Id.* at 4-5. According to private counsel, by prohibiting filings by facsimile the PAB "is not only out of step with its colleagues," but "it also penalizes Petitioners who are represented by private counsel rather than PAB/OGC attorneys." *Id.* at 5. In this latter regard, private counsel allege that, unlike PAB/OGC attorneys who "are located at the same physical street address as the Board, private counsel representing petitioners will always be some distance away from the Board. Thus, filing by hand delivery will either be more difficult or impossible." *Id.* Additionally, private counsel contend that "[w]ithout the option of hand

delivery, the only other means of filing the Board permits is U.S. mail,” which, “even within the same city, typically takes at least a few days.” *Id.*

2. Representation by Private Counsel and the PAB/OGC

Private counsel state that the May 29 Order “included a footnote stating that ‘allowing a second filing would appear to be inconsistent with the concept of an election set forth in the PAB’s regulations. . . .’” Motion at 6 (quoting May 29 Order at 4 n.3). Private counsel further state that “AJ Svartz’s July 13, 2007 [sic] reiterated this argument.” *Id.* (quoting July 13 Order at 6 n.2). Private counsel assert that “[a]pparently this misunderstanding of Board regulations was considered in determining whether to accept Petitioner’s tardy Petition.” *Id.* According to private counsel, 4 C.F.R. § 28.12(d) permits the filing by private counsel of “a separate petition with the Board on issues for which OGC did not choose to represent” the Petitioner, and in this case “Petitioner elected to file a petition with the Board, through her private counsel, with regard to the issues in her charge for which PAB/OGC did not find reasonable grounds.” *Id.* at 7.

Further, private counsel contend that, “[g]iven the obvious confusion,” the Administrative Judge should “certify this question to the Board so it may clarify the issue for petitioners.” *Id.* In this regard, private counsel state:

In addition to clarifying this regulation, the Administrative Judge should certify this question to the Board so that the Board may determine whether the Administrative Judge improperly considered a Board regulation he misunderstood when dismissing Petitioner’s May 22, 2007 Petition and denying Petitioner’s June 8, 2007 Request for Reconsideration. Failing to do so would cause Petitioner the undue harm of preventing the Board from considering whether this erroneous interpretation resulted in the dismissal of Petitioner’s Petition.

Id.

3. Good Cause

After recounting the circumstances concerning the improper and untimely filing of the Petition, private counsel assert that “though the AJ is correct of course that the Petition was filed one month following its due date, it was filed less than one week after Petitioner’s counsel learned of a potential error and the day following (given the lateness of the hour) Petitioner’s counsel’s determination that there was in fact a definite error in filing the Petition. As such, the delay was in fact minimal and good cause exists to permit acceptance of the Petition.” *Id.* at 8-9.

Private counsel further state that the Administrative Judge “also finds that Petitioner did not establish good cause because she was represented rather than *pro se*. However, . . . Ms. Atkinson is a first year associate and neither Ms. Atkinson nor Mr. Gilbert has ever practiced before the Personnel Appeals Board.”⁵ *Id.* at 9.

⁵ This fact alone should have directed one of the representatives to practice due diligence and read the applicable regulations instead of relying solely on a reading of a Certificate of Service.

Finally, private counsel assert that the Administrative Judge “should certify this issue to the Board for an interlocutory ruling because the decision to reject her Petition was based, at least in part, on important questions of law about which there is substantial difference of opinion and because failing to do so would result in undue harm to Petitioner.” *Id.*

C. GAO’S RESPONSE TO PETITIONER’S MOTION FOR CERTIFICATION

GAO requests that the Motion for Certification of an Interlocutory Ruling be denied because none of the arguments set forth in the Motion meet the regulatory criteria for certification. GAO states that, under 4 C.F.R. § 28.81(a)(1) and (2), “the Board’s regulations limit certifications to important questions of law or policy about which there is substantial ground for difference of opinion; where an immediate Board review of an Administrative Judge ruling will materially advance the completion of the proceeding; or where denial will cause undue harm to a party or the public.” Response at 3. According to GAO, Petitioner’s Motion for Certification “does not present important questions of law or policy about which there is substantial ground for difference of opinion, or otherwise fit within the factors listed above.” *Id.* at 3-4. GAO’s arguments with respect to each of the issues presented by private counsel are set forth more fully below.

1. Filing by Facsimile

GAO contends that no important question of law or policy is presented by private counsel’s assertion that the PAB’s regulation requiring filing by hand-delivery or by U.S. Mail is outdated and should be revised. According to GAO, “[e]ven if the Board were to immediately decide to accept facsimile filings, that would not alter the fact that private counsel had a responsibility and obligation to follow the Board regulations that applied at the relevant time.” Response at 4. GAO also asserts that there is no evidence to support private counsel’s contention that “the Board’s regulation penalizes petitioners represented by private counsel because private attorneys would find it more difficult than the PAB/OGC to arrange for hand-delivered filings.” *Id.* Finally, GAO notes that “filing by hand-delivery or U.S. mail has been the norm for years in all forums, including the U.S. Federal courts.” *Id.*

2. Representation by Private Counsel and the PAB/OGC

GAO disputes private counsel’s contention that the undersigned Administrative Judge might have based his decision to deny acceptance of the Petition based in part on his misunderstanding of Board regulations regarding whether a petitioner could be represented by private counsel on issues where the PAB/OGC has chosen not to represent her. According to GAO, footnote 3 in the May 29 Order “clearly states that [the Administrative Judge] did not reach the issues concerning a second filing by private counsel because his decision was based on the procedural deficiencies of the Gilbert petition.” *Id.* at 5. In addition, GAO contends that the July 13 Order reflects that the Petition was dismissed because the Administrative Judge “found that Petitioner did not establish good cause for untimely filing and improper service” and “rejected Petitioner’s harmless error argument based on a finding of prejudice to GAO if the petition were accepted.” *Id.* at 5-6 (footnote omitted). In sum, GAO contends that “there is no basis for Petitioner’s contention that the Administrative Judge misunderstood Board regulations or that an interlocutory ruling is needed on this issue.” *Id.* at 6.

3. Good Cause

GAO contends that the May 29 and July 13 Orders “fully describe that Petitioner failed to exercise due diligence after receiving clear filing instructions, that a failure to follow explicit instructions does not constitute good cause for a filing delay, and that there was an absence of circumstances beyond counsel’s control that interfered with proper filing.” *Id.* The Agency also notes that the two Orders “clearly establish that Petitioner was, at every stage, represented by two attorneys, rather than being pro se.” *Id.* In response to private counsel’s arguments that “Ms. Atkinson is a first year associate, and that neither Ms. Atkinson nor Mr. Gilbert [was] experienced with Board practice,” GAO asserts that: (1) “[a]s a licensed attorney, Ms. Atkinson was required to exercise due diligence on behalf of her client and to consult the filing procedures to which she was referred in the ‘Right to Petition’ letter that she received from the PAB/OGC;” (2) “[f]ailure to consult the PAB regulations cannot establish good cause;” (3) “courts have traditionally rejected the notion that a lawyer’s delegation of tasks to another lawyer or even to a non-lawyer employee amounts to excusable neglect if that lawyer or staff member errs;” and (4) MSPB case law is clear that delays by counsel are not excused even though the impact may be on the client.” *Id.* at 6-7.

II. ANALYSIS

Section 28.81(a) of the PAB’s regulations states:

Interlocutory review by the Board of a ruling by the administrative judge during the course of the proceeding is disfavored and will be permitted only in circumstances where:

- (1) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and
- (2) An immediate review of the ruling by the Board will materially advance the completion of the proceeding, or denial will cause undue harm to a party or the public.

4 C.F.R. §28.81(a) (emphasis added).

A. Filing by Facsimile

As their first argument, private counsel contend that the Board’s regulation authorizing filings of petitions by mail or hand-delivery is out-of-date because it does not allow filing by facsimile. This argument does not warrant interlocutory review because it does not present an important question of law or policy about which there is a substantial ground for difference of opinion.

The methods by which an administrative agency chooses to accept filings are governed by that particular agency’s regulations. The fact that some agencies, such as the EEOC and the MSPB, permit certain filings by facsimile is irrelevant to the regulations governing filings with the PAB. In this regard, there is no contention that the PAB’s regulation permitting filing only by mail or hand-delivery is ambiguous or confusing, or that private counsel had not been fully apprised of the acceptable methods of filing under the regulation. In addition, there is no evidence to support private counsel’s argument that the PAB’s regulation “penalizes Petitioners who are represented by private counsel

rather than PAB/OGC attorneys” because “private counsel representing petitioners will always be some distance away from the Board” and, therefore, “filing by hand delivery will either be more difficult or impossible.” Motion at 5. Other private counsel in PAB cases have been able to make timely filings by hand-delivery despite the fact that they, like the private counsel in this case, are not co-located in the same building as the PAB. *See, e.g., Clarke v. GAO*, Docket No. 05-03; *Horton v. GAO*, Docket No. 01-09. Similarly, the fact that, as argued by private counsel, filings submitted by U.S. Mail typically take at least a few days has not prevented other private counsel or *pro se* petitioners from making timely filings with the PAB by U.S. Mail. *See, e.g., S.Davis v. GAO*, Docket No. 00-05; *Vargas v. GAO*, Docket No. 00-04; *Gaston v. GAO*, Docket No. 99-02.

In fact, the Board’s regulations specifically provide that a petition may be filed by mail, and that, when filed by mail, the postmark shall be the date of filing. 4 C.F.R. §28.18(c)(2) (emphasis added). Thus, there is no prejudice to a petitioner or counsel who must file by mail rather than by hand delivery.

Moreover, even if the PAB were to determine that filing by facsimile should be permitted, such a determination would require amendment of the Board’s regulations through the regulatory process and any such regulation, as amended at some future date, would not apply to the instant case. *See Desai v. EPA*, 2007 MSPB LEXIS 1411 at 8-9 (Feb. 23, 2007).

Finally, the Petition submitted by private counsel by facsimile would have been dismissed as untimely even if filing by facsimile were permitted under the regulations, since the facsimile was received 29 days after the filing was due. Hand delivery or postmark by April 23 was required.

In sum, private counsel have not demonstrated that an important question of law or policy about which there is a substantial ground for difference of opinion is presented by an agency’s determination whether or not to accept filings by facsimile. Accordingly, this argument does not warrant granting certification.

B. Representation by Private Counsel and the PAB/OGC

As their second argument, private counsel contend that the undersigned Administrative Judge “misunderstood” Board regulations concerning the circumstances under which a Petitioner could be represented by private counsel when the Petitioner has elected to be represented by PAB/OGC, and that “[a]pparently this misunderstanding of Board regulations was considered in determining whether to accept Petitioner’s tardy Petition.” Motion at 7, 6. Private counsel allege that certification is warranted to clarify the regulations and to allow the Board to “determine whether the Administrative Judge improperly considered a Board regulation he misunderstood when dismissing” the Petition and the Request for Reconsideration. *Id.* at 7.

This argument does not present a basis warranting certification. The May 29 Order made clear that the dismissal of the Petition was based on private counsel’s “failure to comply with the PAB’s requirements” concerning when and how the Petition was filed. May 29 Order at 4. The May 29 Order also explicitly stated that, “in light of the procedural deficiencies in the May 22

facsimile submission, *I need not resolve*: (1) whether the Petition submitted by Ms. Krell’s private counsel involved the same matter as the Petition filed by the PAB/OGC; or (2) whether the Petition submitted by Ms. Krell’s private counsel would have been considered properly before the PAB even if it had been timely filed in accordance with the PAB’s procedural requirements.” May 29 Order at 4 n.3 (emphasis added). Since no determination was made as to these matters, there is no determination that requires clarification.

Similarly, the July 13 Order denying the Request for Reconsideration found that no good cause was established for private counsel’s acknowledged failure to comply with either the timeliness or manner of filing the Petition. July 13 Order at 15. In denying the Request for Reconsideration, the July 13 Order did not analyze or rely upon the circumstances under which a Petitioner could be represented by private counsel when the Petitioner has elected to be represented by PAB/OGC; rather, the Order (at 6 n.2) simply reiterated the statements from the May 29 Order.

Accordingly, neither the dismissal of the Petition nor the denial of the Request for Reconsideration was based in any part on any alleged misunderstanding of Board regulations. Rather, as made clear in both the May 29 and July 13 Orders, the Petition was dismissed for private counsel’s failure to comply with the PAB’s procedural requirements concerning when and how to file a petition. Consequently, private counsel’s argument in this regard fails to provide any basis warranting certification.

C. Good Cause

Private counsel’s final argument also fails to present a basis warranting certification. In essence, this argument reiterates contentions that were made and rejected previously. Neither Ms. Atkinson’s reliance on a certificate of service used by the PAB/OGC nor her status as a first year associate attorney presents an issue warranting certification. Similarly, the fact that Ms. Atkinson and Mr. Gilbert had not previously practiced before the PAB does not excuse their failure to comply with clear regulatory provisions of which they admittedly had ample notice and does not demonstrate good cause for their failure to comply with those regulatory requirements.

In this regard, private counsel claim that certification is warranted because the decision to dismiss the Petition “was based, at least in part, on important questions of law about which there is substantial difference of opinion and because failing to do so would result in undue harm to Petitioner.” Motion at 9. This contention is without merit. As set forth above, the dismissal of the Petition was not based in any part on important questions of law about which there is substantial difference of opinion. Rather, the dismissal of the Petition was based entirely on the plain application of clear procedural regulations of which private counsel was fully apprised. Moreover, private counsel’s contention that failure to grant certification would result in undue harm to Petitioner also provides no basis warranting certification.⁶ An attorney’s negligent

⁶ Private counsel state that “Petitioner elected to file a petition with the Board, through her private counsel, with regard to the issues in her charge *for which PAB/OGC did not find reasonable grounds.*” Motion at 7 (emphasis added). However, all but one of the issues in the Petition submitted by private counsel are the same as those for which the PAB/OGC found reasonable grounds and included in the pending PAB/OGC Petition. In fact, a comparison of the PAB/OGC Petition with the May 22 Petition shows that the factual allegations (FAs) in the PAB/OGC Petition are largely repeated in the May 22 Petition. *Compare* PAB/OGC FAs (noted in *italics*) with May 22 FAs (noted in **bold**): 1 and **6, 7**; 2 and

actions that result in filing a petition even one day late have been found not to constitute good cause for waiver of a time limit. *See, e.g., Skaggs v. Department of the Navy*, 2006 MSPB LEXIS 4692 (Aug. 15, 2006). *See also Harley v. GAO*, PAB Docket No. 23-201-17-83 (Apr. 25, 1984) (Petition dismissed because Petitioner did not request waiver to file Petition late until one month after due date). In sum, the motion does not demonstrate that certification is merited in the circumstances of this case.

CONCLUSION

For the reasons set forth above, the Motion for Certification to the Board of an Interlocutory Ruling is denied.

SO ORDERED.⁷

9; 3 and 10; 4 and 11; 5 and 12; 6 and 13; 11 and 15; 13 and 16; 15 and 18, 19. Further, the May 22 Petition expressly relies on the PAB/OGC Petition in its FA #14, which states: “Discrimination and retaliation against Petitioner continued throughout 2006, as described in further detail in the related Petition filed by the PAB/OGC on April 20, 2007. May 22 Petition at 4. The sole apparent difference between the Petitions is that the May 22 Petition included a challenge to a 10-day suspension, which the PAB/OGC Petition did not. *See* July 13 Order at 5.

⁷ Pursuant to §28.81(d) of the PAB’s regulations, this Memorandum and Order denying the Motion for Certification is being brought to the attention of the Board.