

**SANDRA P. DAVIS v. U.S. General Accounting Office**

**Docket Nos. 00-05; 00-08**

**Date of Decision: January 28, 2002**

**Cite as: Davis v. GAO, Docket No. 00-05 (1/28/02)**

**Before: Michael Wolf, Administrative Judge**

**Headnotes:**

**Discretion of Administrative Judge**

**Good Cause**

**Motions Practice**

**Timeliness**

**ORDER**

**PERSONNEL APPEALS BOARD  
U.S. GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C.**

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<b>SANDRA P. DAVIS,</b>	)	
	)	<b>Docket No. 00-05</b>
<b>Petitioner</b>	)	
	)	<b>Docket No. 00-08</b>
<b>v.</b>	)	
	)	
<b>UNITED STATES GENERAL</b>	)	
<b>ACCOUNTING OFFICE,</b>	)	January 28, 2002
	)	
<b>Respondent</b>	)	
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**ORDER**

At the close of the evidentiary hearing in this case, the parties agreed to submit post-hearing briefs to the PAB on January 18, 2002. Under the Board's regulations, the parties were required to submit an original and three copies of the brief. 4 CFR §28.60(c). I reminded the parties on the record that the deadline required the briefs to be at the Board's offices no later than 4:00pm on the 18<sup>th</sup>. Tr. 1315-16.

The Respondent's brief (original and three copies) was filed on time. Petitioner's brief was not received in the Board's office as of the time that the office was closed at approximately 5:00pm.<sup>1</sup> On January 22, 2002, I issued an Order rejecting Petitioner's brief and directing Petitioner to file a Motion for Leave to File Out of Time. That Motion was filed on January 23, 2002. The Respondent filed an Opposition on January 24, 2002.

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<sup>1</sup> A telefaxed copy of Petitioner's brief was found in the PAB office when it was opened on the next business day (January 22, 2002). Petitioner also sent a single copy of the brief by messenger, which copy was received on January 22, 2002. The original and three copies that Petitioner mailed at 9:51pm on January 18,<sup>th</sup> were received at the Board's office on January 23, 2002.

For the reasons below, the **Motion for Leave is denied** and the brief is being returned to Petitioner's counsel.

Petitioner does not dispute that she failed to file an original and three copies of her brief by the 4:00pm, January 18, 2002 deadline. Instead, her Motion for Leave to File Out of Time attempts to explain that she filed a telefaxed copy of the brief prior to that deadline. Her explanation is not supported by the facts. Petitioner's counsel asserts that she telephoned the Acting Clerk of the Board and then began telefaxing a copy of her brief at 3:31pm. In fact, the Acting Clerk of the Board received a telephone call from Petitioner's counsel at approximately 4:10pm (*i.e.*, after the deadline for submission of the brief) to the effect that the brief was going to be late. Further, the Board's Solicitor and its Executive Director were in the Board's office until approximately 5:00pm. They checked the fax machine when they left, and no brief was present. A telefaxed copy of the brief was found in the fax machine on January 22, 2002, which was the next business day for the Board. The Activity Report for the Board's fax machine shows that transmission of Petitioner's brief began at 4:26pm. Transmission lasted for thirty-six minutes and thirty-seven seconds. Because of the length of the brief, it did not begin printing until after 5:00pm.

The Transmission Report for Counsel's fax machine shows a start time of 4:31pm, a duration of thirty-six minutes and one second, and a confirmation report time of 5:07pm. However, Petitioner's counsel states that her fax machine remains on Eastern Standard Time year round, implying that her machine did not adjust for Daylight Saving Time. She contends that, "the clock [on her fax machine] displays the time as one hour ahead of the actual time." She therefore contends that, when her fax machine recorded a start time of 4:31pm, it really was 3:31pm.

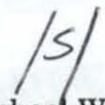
To begin with, Daylight Saving Time does not begin until April 7, 2002. On January 18, 2002, we were on Eastern Standard Time. As a result, the time represented by the Transmission Report from counsel's fax machine was accurate. Moreover, the times shown on both fax machines (counsel's and the Board's) are almost exactly the same: on January 18, 2002, the brief initiated transmission at approximately 4:30pm, and the fax was received after 5:00pm. Neither time complied with the Board's directive.

The foregoing shows not only that the telefaxed copy of the brief and the subsequently mailed and hand-delivered copies were submitted beyond the deadline set by the Board, but it also shows that Petitioner's counsel has misrepresented the facts that led to the delay. Had Petitioner presented a forthright explanation for the delay, then her Motion for Leave might have been granted. However, because Petitioner's Counsel has not presented a credible explanation for her delay, the Motion for Leave is denied and the brief is being returned to Petitioner's counsel.

Finally, Petitioner argues that it would be "arbitrary and capricious" for me to deny the Motion for Leave. It is neither arbitrary nor capricious to reject a motion for leave to file out of time that is without support and is premised on misrepresentations and misstated facts. Further, the final decision that I reach in this case will rest on my review of all the evidence in the record as well as consideration of Petitioner's pre-hearing brief and the pleadings. Denial of this motion will not impair her right to a fair and objective final decision.

**SO ORDERED.**

Date 1/28/02

  
Michael Wolf  
Administrative Judge